

# Exhibit 1

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE EASTERN DISTRICT OF TEXAS

3 MARSHALL DIVISION

4 HEADWATER RESEARCH, LLC , ) (

5 PLAINTIFF, ) ( CIVIL ACTION NO.

6 ) ( 2:22-CV-422-JRG-RSP

7 VS. ) ( MARSHALL, TEXAS

8 ) (

9 SAMSUNG ELECTRONICS AMERICA, ) ( APRIL 24, 2024

10 INC., ET AL., ) (

11 DEFENDANTS. ) ( 9:06 A.M.

12 MOTIONS HEARING

13 BEFORE THE HONORABLE ROY S. PAYNE

14 UNITED STATES MAGISTRATE JUDGE

15  
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Eastern District of Texas  
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produced on a CAT system.)

09:06:35  
09:06:35

09:06:36 1 COURT SECURITY OFFICER: All rise.

09:06:36 2 THE COURT: Good morning. Please be seated.

09:06:37 3 For the record, we're here for the motion hearings  
09:06:48 4 in Headwater Research versus Samsung Electronics, et al.,  
09:06:53 5 Case No. 2:22-422 on our docket.

09:06:57 6 Would counsel state their appearances for the  
09:06:59 7 record?

09:07:01 8 MR. BUNT: Good morning, Your Honor. Chris Bunt  
09:07:05 9 here on behalf of the Plaintiff, Headwater. With me is  
09:07:10 10 Mr. James Tsuei and Mr. Peter Tong, and we're ready to  
09:07:15 11 proceed.

09:07:15 12 THE COURT: All right. Thank you, Mr. Bunt.

09:07:18 13 MR. GORHAM: Good morning, Your Honor. Tom Gorham  
09:07:20 14 on behalf of the Samsung Defendants. With me here this  
09:07:24 15 morning is Leonard Davis, Thad Kodish, and Noah Graubart.  
09:07:29 16 We are ready to proceed, Your Honor.

09:07:30 17 THE COURT: All right. Thank you, Mr. Gorham.

09:07:32 18 I understand we have a number of motions on the  
09:07:42 19 docket, and I understand further that counsel filed a joint  
09:07:46 20 report last night, which I have had some opportunity to  
09:07:52 21 look at.

09:07:57 22 But I guess my preference is to start with the  
09:08:01 23 motion regarding the privilege issue and review. And I  
09:08:09 24 would like to hear from Samsung first on that as to what  
09:08:18 25 items on the privilege log, as it exists now, they are

09:08:23 1 disputing.

09:08:24 2 MR. GRAUBART: Good morning, Your Honor.

09:08:34 3 Noah Graubart with Fish & Richardson for Samsung.

09:08:37 4 So I'm assuming Your Honor is referring to the  
09:08:39 5 issue about which we had a hearing in March concerning a  
09:08:45 6 third party, Krista Jacobsen, and her privilege log?

09:08:48 7 THE COURT: As far as I know, that's the only  
09:08:51 8 privilege log at issue.

09:08:52 9 Are there others?

09:08:53 10 MR. GRAUBART: There are other motions that do  
09:08:55 11 involve some privilege log issues.

09:08:55 12 THE COURT: All right.

09:08:57 13 MR. GRAUBART: But I assume that's what we're  
09:08:59 14 talking about, and so I can briefly address that.

09:09:03 15 As we left it from the hearing on March 14th,  
09:09:06 16 there were four categories remaining of documents on the  
09:09:12 17 privilege log that Headwater had identified these buckets  
09:09:16 18 that they contended the documents all fell within.

09:09:21 19 And -- and what Your Honor stated a willingness  
09:09:27 20 to do at the time was to review in camera, perhaps here in  
09:09:30 21 the courtroom, just outside of Samsung's eyeshot, a  
09:09:33 22 sampling of documents from each of those four buckets. And  
09:09:38 23 Headwater had proposed that they would select a few. And  
09:09:41 24 then Your Honor said, well, they can select a few, and we  
09:09:43 25 can select a few.

09:09:45 1 So each side has selected five documents from each  
09:09:47 2 of those four categories. So each side selected 20  
09:09:51 3 documents each for a total of 40.

09:09:53 4 THE COURT: I don't see a particular reason to  
09:09:55 5 start with Headwater's.

09:09:59 6 MR. GRAUBART: We're fine with that, Your Honor.

09:10:01 7 So I understood that Headwater's local counsel had  
09:10:05 8 delivered to the Court yesterday paper copies of both  
09:10:10 9 sides' selections.

09:10:11 10 THE COURT: That is my understanding as well.

09:10:13 11 MR. GRAUBART: Okay. And I understand from  
09:10:15 12 Mr. Tsuei this morning that there was -- there were two of  
09:10:17 13 Samsung's selections that were very large, so they brought  
09:10:21 14 with them today an electronic copy.

09:10:22 15 But -- so I can -- I can read to Your Honor the  
09:10:30 16 numbers of the documents we've selected. I'll just say  
09:10:32 17 that, you know, based on the content or the descriptions on  
09:10:34 18 the privilege log, we're very much in the dark as to really  
09:10:36 19 what these documents are. I'm not really able to provide  
09:10:39 20 any -- any context or -- or commentary on them, frankly.

09:10:43 21 You know, for example, in the first bucket, I  
09:10:45 22 think all of the descriptions say something like attorney  
09:10:50 23 work product analyzing patent family prosecution issues.

09:10:53 24 According to Headwater, the description of the  
09:10:57 25 bucket is Internal Headwater Memoranda Addressing Validity

09:11:02 1 and Materiality of Prior Art After Allowance. I can't say  
09:11:07 2 whether that's accurate or not.

09:11:08 3 THE COURT: Does it represent who the author of  
09:11:10 4 the document was?

09:11:11 5 MR. GRAUBART: Each of these, Your Honor,  
09:11:13 6 references Ms. Jacobsen on the log and no other person.

09:11:17 7 THE COURT: And so are you disputing that  
09:11:23 8 Ms. Jacobsen prepared these as a way to communicate her  
09:11:31 9 advice to Headwater?

09:11:32 10 MR. GRAUBART: There's nothing indicating from the  
09:11:37 11 face of the log that that's the case. That may be that --  
09:11:42 12 you know, all of the documents that a patent prosecutor  
09:11:46 13 creates are not privileged, right? They're not all created  
09:11:50 14 reflecting attorney advice to be communicated to the client  
09:11:52 15 or vice versa. Some presumably are. But there's not --  
09:11:57 16 wasn't a basis on the log to determine it.

09:12:00 17 THE COURT: Show me the log entry that you're  
09:12:03 18 referring to.

09:12:04 19 MR. GRAUBART: So on the -- I believe --  
09:12:07 20 Mr. Tsuei, did the cover sheet get delivered to the Court  
09:12:10 21 yesterday?

09:12:10 22 MR. TSUEI: I don't believe so since that was not  
09:12:14 23 finalized.

09:12:15 24 MR. GRAUBART: So the -- I can tell you the  
09:12:18 25 control number on the log, but I don't have with me that

09:12:21 1 entire log from Ms. Jacobsen. It's -- the first entry that  
09:12:25 2 Samsung had collected is Control No. 586932, and it gives a  
09:12:34 3 date of June 24th, 2013. It says that the author is Krista  
09:12:40 4 Jacobsen. It says that it's attorney work product  
09:12:43 5 analyzing patent family prosecution issues. And it says  
09:12:46 6 that the basis for withholding it is attorney-client  
09:12:49 7 privilege and attorney work product.

09:12:54 8 THE COURT: And so tell me what causes you to be  
09:12:57 9 skeptical about whether or not she prepared this as a means  
09:13:03 10 of advising her client.

09:13:05 11 MR. GRAUBART: Well, if Your Honor remembers the  
09:13:08 12 history, there were almost 600 documents withheld on the  
09:13:11 13 basis of privilege. Originally, on work product, which  
09:13:16 14 then after forcing Samsung to file a motion to compel,  
09:13:19 15 Headwater or Ms. Jacobsen did a 180 and said, no, no, I  
09:13:23 16 mean attorney-client privilege.

09:13:24 17 But there was no detail provided to explain how  
09:13:28 18 every single document from -- that Ms. Jacobsen created  
09:13:32 19 would be actually an attorney-client communication.

09:13:35 20 And at the last hearing, Mr. Fenster, for  
09:13:38 21 Headwater, described eight categories of documents to  
09:13:42 22 Your Honor, and even on their face, Your Honor found that  
09:13:45 23 three of them weren't privileged.

09:13:48 24 And with respect to the other four, if, in fact,  
09:13:50 25 they were all -- everything in the category met the



09:13:54 1 description that Mr. Fenster give -- gave, then, in fact,  
09:13:57 2 it sounds like they might be privileged. But we don't  
09:14:01 3 know. And the history suggests that there was a very fast  
09:14:04 4 and loose application of asserted privilege here, and the  
09:14:07 5 log itself just simply doesn't provide the basis on which  
09:14:10 6 one can determine.

09:14:10 7 THE COURT: What in the history indicates a fast  
09:14:12 8 and loose application of the privilege?

09:14:15 9 MR. GRAUBART: Most -- primarily, the fact that  
09:14:18 10 for months and months, Headwater asserted that all of the  
09:14:22 11 documents were protected only by the attorney work product  
09:14:25 12 doctrine.

09:14:25 13 THE COURT: I thought that was Ms. Jacobsen  
09:14:27 14 asserting that.

09:14:28 15 MR. GRAUBART: I apologize. They're the same  
09:14:31 16 counsel, Your Honor, so I -- in my head, I frequently  
09:14:34 17 interchange them.

09:14:35 18 THE COURT: I mean, that's a very big difference.  
09:14:37 19 I think the reason that at the last hearing I  
09:14:41 20 determined that the privilege hadn't been waived was that  
09:14:45 21 you were seeking the discovery from counsel -- former  
09:14:51 22 counsel, and former counsel can't waive the client's  
09:14:55 23 privilege.

09:14:55 24 MR. GRAUBART: Understood, Your Honor. And so  
09:14:57 25 when I say Headwater has been fast and loose with it, I can

09:15:00 1 replace that as to say Ms. Jacobsen was fast and loose with  
09:15:04 2 it.

09:15:04 3 THE COURT: And it's not a small matter. It's a  
09:15:08 4 question of being accurate.

09:15:10 5 MR. GRAUBART: Understood, Your Honor.

09:15:11 6 THE COURT: Go ahead.

09:15:11 7 MR. GRAUBART: Okay. So -- well, I can say  
09:15:15 8 Ms. Jacobsen's counsel, who was Headwater's counsel, has  
09:15:21 9 been inconsistent in their positions and changes the  
09:15:25 10 positions after we're forced to seek relief from the Court.

09:15:30 11 And even the descriptions that were provided  
09:15:33 12 verbally to Your Honor at the last hearing for the first  
09:15:36 13 time, Your Honor found several of them did not support  
09:15:39 14 privilege.

09:15:40 15 And so as I say, if -- if Ms. -- if, in fact, a --  
09:15:44 16 Your Honor reviews a handful of documents from these  
09:15:48 17 remaining four categories and determines that they do match  
09:15:50 18 the description that Mr. Fenster gave for the first time at  
09:15:55 19 that hearing, then -- then presumably that's a -- then  
09:16:00 20 those documents in that category are, in fact, privileged.

09:16:02 21 THE COURT: I'm trying to figure out at this point  
09:16:05 22 what it is about the privilege log that is causing you to  
09:16:11 23 select certain documents for in camera review.

09:16:14 24 MR. GRAUBART: And -- and it's a fair question,  
09:16:17 25 Your Honor. We were -- are completely in the dark as to

09:16:20 1 what these documents are. As I say, the log description  
09:16:22 2 doesn't match what the category Ms. Jacobsen's counsel has  
09:16:28 3 bucketed them into. And so it was largely a -- throwing a  
09:16:35 4 dart board -- dart at the wall to identify these -- the  
09:16:40 5 five from each category.

09:16:41 6 THE COURT: Is there something about the privilege  
09:16:43 7 log that you think makes it difficult for you to determine  
09:16:49 8 whether these should be privileged or not?

09:16:53 9 MR. GRAUBART: Sure. For example, if we're now --  
09:16:55 10 now Ms. Jacobsen is asserting attorney-client privilege,  
09:16:58 11 not work product. But none of the entries identify a  
09:17:03 12 client. There is no recipient other than it just describes  
09:17:08 13 Ms. Jacobsen as the author.

09:17:09 14 And we know from the result of the last hearing  
09:17:13 15 that there were around a hundred documents of a similar  
09:17:16 16 nature that were listed as only having Ms. Jacobsen that  
09:17:19 17 Your Honor ordered produced because they were not  
09:17:21 18 privileged. And they match similar descriptions on the log  
09:17:24 19 of things describing draft filings for prosecution, but  
09:17:27 20 they weren't, in fact, communications from counsel or to --  
09:17:32 21 to a client. They were just in -- the attorney's notes.

09:17:36 22 THE COURT: Well, that -- that was a fairly easy  
09:17:39 23 determination because the log demonstrated that they  
09:17:43 24 weren't communications. These --

09:17:48 25 MR. GRAUBART: I guess what I would say, Judge, is

09:17:50 1 that the only assertion -- the only basis for finding that  
09:17:52 2 these four categories remaining would be protected by  
09:17:55 3 privilege are the verbal representation of Ms. Jacobsen's  
09:17:59 4 counsel at the last hearing offered for the first time  
09:18:02 5 after briefing was closed. The log doesn't support it.  
09:18:05 6 There's no evidentiary record from -- that is sufficient to  
09:18:10 7 support it. But it may very well be that upon review that  
09:18:14 8 they are supported. But normally, the way that this would  
09:18:17 9 occur is that the log would on its face demonstrate the  
09:18:20 10 applicability.

09:18:20 11 THE COURT: I agree. And if the log doesn't --  
09:18:23 12 and, of course, I've never seen the log, and you don't have  
09:18:25 13 the log today for me to look at. But if the log doesn't  
09:18:28 14 show what a log is supposed to show, typically the party  
09:18:34 15 seeking production would raise the issue of whether the log  
09:18:37 16 is insufficient.

09:18:39 17 MR. GRAUBART: And, Your Honor, as a bit of  
09:18:43 18 history, if you -- when we first moved to compel, there was  
09:18:47 19 a different log that only asserted work product.

09:18:50 20 After we filed our motion, Ms. Jacobsen created a  
09:18:54 21 new log and said, ah-ha, this is actually attorney-client  
09:18:58 22 privilege.

09:18:58 23 But then when they filed their opposition to  
09:19:01 24 the -- to the motion, they didn't attach that log. So the  
09:19:05 25 log that supports allegedly privilege here has never been

09:19:08 1 put in the record.

09:19:10 2 At the -- before the last hearing, I identified  
09:19:12 3 that problem to Ms. Jacobsen's counsel, and they  
09:19:16 4 represented the night before that they would file it with  
09:19:18 5 the Court. They never did. So I showed up here last time  
09:19:22 6 with a paper copy for Your Honor to review, but the party  
09:19:26 7 asserting privilege has never actually put the log before  
09:19:29 8 the Court. So that's, again, my point about the fast and  
09:19:31 9 loose nature here.

09:19:33 10 This whole assertion is really not -- not  
09:19:37 11 protected by anything -- excuse me, not supported by  
09:19:40 12 anything in the record.

09:19:41 13 THE COURT: You know, it's normally the party who  
09:19:43 14 is seeking production who demonstrates to the Court the  
09:19:47 15 insufficiency of the privilege log.

09:19:49 16 MR. GRAUBART: The log we put into the record with  
09:19:51 17 our motion, Your Honor --

09:19:53 18 THE COURT: Is there a log in the record?

09:19:55 19 MR. GRAUBART: They were -- so this original  
09:19:57 20 motion was filed with the Northern District of California.  
09:20:01 21 It was transferred to this district. And I don't have  
09:20:06 22 the -- the docket number handy, and it doesn't match a  
09:20:10 23 docket number on this case's docket because of that  
09:20:14 24 procedural history.

09:20:14 25 But according to Ms. Jacobsen's counsel, that log

09:20:17 1 is no longer operative. They supplement -- they superseded  
09:20:21 2 it later, but they never provided the new one to the Court.

09:20:26 3 THE COURT: And you're representing that you filed  
09:20:28 4 the old log before the motion was transferred?

09:20:32 5 MR. GRAUBART: That's -- was the only log that  
09:20:35 6 existed at the time we filed our motion. Ms. Jacobsen, in  
09:20:40 7 response to our motion, created a new log. They did serve  
09:20:43 8 it, but they filed the wrong one in opposition to our  
09:20:47 9 motion.

09:20:47 10 THE COURT: What I'm asking is: Are you  
09:20:49 11 representing that you filed the earlier privilege log into  
09:20:53 12 the record in California?

09:20:55 13 MR. GRAUBART: That's my memory, Your Honor.

09:21:00 14 THE COURT: Well, let's see if that's available.

09:21:18 15 The reason for this inquiry, Mr. Graubart, is I am  
09:21:24 16 trying to figure out a way to resolve this motion, and I  
09:21:32 17 don't have any problem in looking at a handful of documents  
09:21:37 18 that you select. It seems very random. But if -- if  
09:21:44 19 you're willing to go with the idea that what you're  
09:21:48 20 offering up is representative and that will resolve it,  
09:21:51 21 then we can do that.

09:21:54 22 But I'm -- it is just odd to me that there is what  
09:22:00 23 seems to be from your point of view an insufficiency in the  
09:22:05 24 privilege log, and that hasn't been addressed with the  
09:22:09 25 Court.

09:22:11 1 MR. GRAUBART: Well, if the only log in the record  
09:22:14 2 is the original one asserted -- I mean, attached to our  
09:22:17 3 motion, the only basis that Ms. Jacobsen is asserting is  
09:22:21 4 work product, which they -- which there is no legal basis  
09:22:24 5 to assert. The only argument in their -- in their  
09:22:27 6 opposition papers was a new assertion of attorney-client  
09:22:31 7 privilege that was only offered in the revised log that was  
09:22:34 8 never filed with the Court.

09:22:36 9 So if we want to stick with the only log that's  
09:22:39 10 before the Court, it's the one that asserts work product,  
09:22:42 11 and this will be an easy call for Your Honor, none of them  
09:22:45 12 are protected by work product, and we can produce all of  
09:22:48 13 them.

09:22:48 14 I don't think that's probably the most --

09:22:50 15 THE COURT: That's also been rejected at the last  
09:22:53 16 hearing.

09:22:53 17 MR. GRAUBART: Well, you rejected a waiver, Your  
09:22:56 18 Honor, but you didn't address the -- the merits argument.  
09:23:00 19 There were no merits arguments offered to support work  
09:23:04 20 product for these documents. No one has articulated a  
09:23:07 21 viable basis that the work product doctrine could support  
09:23:10 22 withholding these documents that were created years before  
09:23:13 23 there's any evidence that Headwater has put forward of an  
09:23:18 24 anticipation of litigation.

09:23:19 25 MR. TSUEI: Mr. Graubart...

09:23:21 1 And, Your Honor, if I may, just to quickly  
09:23:24 2 interject with a very narrow point to assist the Court's  
09:23:27 3 discussion and colloquy, the revised privilege log that  
09:23:30 4 Mr. Graubart is referring to was, in fact, filed with the  
09:23:33 5 Court on March 13. That's Docket No. 14 in this  
09:23:40 6 miscellaneous matter.

09:23:40 7 And, you know, without desiring to cut into  
09:23:46 8 Mr. Graubart's time, I'll offer that fact for the Court.

09:23:48 9 MR. GRAUBART: I appreciate that. That may be why  
09:23:50 10 I was not aware of it because the -- of the -- having been  
09:23:53 11 filed in the miscellaneous matter.

09:23:54 12 I think Your Honor's order setting that last  
09:23:56 13 hearing had ordered that all proceedings on that motion  
09:24:00 14 be -- be docketed under the main case docket number. And  
09:24:05 15 I'm not, you know, casting blame, but that would explain  
09:24:09 16 why -- why I wasn't aware it had ever been filed.

09:24:11 17 THE COURT: Well, why don't we pull that log up,  
09:24:19 18 and we can address your issues with that log then?

09:24:25 19 And, Mr. Tsuei, you said that was in what docket  
09:24:28 20 entry?

09:24:29 21 MR. TSUEI: Yes, sir. It's Docket Entry 14 in  
09:24:34 22 Case No. 24-MC-3-RSP.

09:24:40 23 THE COURT: All right. Mr. Graubart, are you able  
09:25:21 24 to access that?

09:25:22 25 MR. GRAUBART: Not standing here. I can see my



09:25:25 1 colleague, Mr. Gorham, is working diligently to try to pull  
09:25:29 2 that up.

09:25:30 3 I do have in front of me excerpts that I -- that I  
09:25:35 4 had pasted of the particular entries that we had selected  
09:25:39 5 from that one.

09:25:40 6 THE COURT: Well, that may work. It's a 274-page  
09:25:43 7 document, but if you can tell me what page you are looking  
09:25:48 8 at or some other way to find the entry, then I'll -- I will  
09:25:54 9 find it.

09:25:54 10 MR. GRAUBART: Okay. So the -- the -- what I  
09:25:58 11 don't know is whether the log is arranged in sequence of  
09:26:02 12 control numbers. But Mr. Gorham is going to hand that to  
09:26:08 13 me right now.

09:26:08 14 THE COURT: It is not -- the control numbers are  
09:26:11 15 not sequential.

09:26:12 16 MR. GRAUBART: Okay. Well, the first one on  
09:26:14 17 the -- on -- that we had selected is -- is 586932. And  
09:26:29 18 that is on Page 69 of the log.

09:26:33 19 THE COURT: All right.

09:26:52 20 MR. GRAUBART: I believe it's Page 70 of the ECF  
09:26:55 21 filing because of the cover sheet, but at the bottom of the  
09:27:04 22 page, it says Page 69 of 273.

09:27:12 23 THE COURT: Let's agree we're going to use the ECF  
09:27:19 24 page number, then, just so the record will be clear.

09:27:23 25 And you said that is Page 69?

09:27:26 1 MR. GRAUBART: The ECF page number is Page 70 of  
09:27:31 2 Page 274.

09:27:32 3 THE COURT: All right.

09:27:32 4 MR. GRAUBART: Excuse me.

09:27:36 5 THE COURT: I am on that page.

09:27:37 6 And what is the other reference?

09:27:41 7 MR. GRAUBART: It is the -- it's 586932. It's the  
09:27:45 8 one that has no entry in the third column.

09:27:51 9 THE COURT: All right. All right. I have that  
09:28:16 10 document in front of me now.

09:28:19 11 And let me turn it over to counsel for Plaintiff  
09:28:24 12 to identify for me why they deem that document to be  
09:28:29 13 privileged.

09:28:29 14 MR. TSUEI: Good morning, Your Honor. James Tsuei  
09:28:44 15 from Russ August & Kabat for Ms. Jacobsen.

09:28:50 16 THE COURT: Good morning, Mr. Tsuei.

09:28:50 17 MR. TSUEI: I represent Headwater, too, in the  
09:28:55 18 related motions involving Headwater, as well, today.

09:28:56 19 So Your Honor is now looking at Docket No. --  
09:28:59 20 rather, Control No. 586932. The control number, if  
09:29:03 21 Your Honor can see it, is at the bottom right-hand corner  
09:29:07 22 of the document starting on each page.

09:29:09 23 The document, broadly speaking, as my colleague,  
09:29:14 24 Mr. Fenster, represented to the Court during the last  
09:29:16 25 hearing, is a memorandum prepared by Ms. Jacobsen

1 specifically in accordance with Headwater's policy for its  
2 counsel to review certain prior art at certain stages  
3 during patent prosecution for families that were pending at  
4 the time and being managed by Headwater's house counsel,  
5 Ms. Jacobsen.

6 Without intending to reveal privileged  
7 communications or information, I can direct your Court's  
8 attention to the very first paragraph that's on the first  
9 page, establishing that the document is, in fact, a  
10 memorandum represent -- or reflecting the review of certain  
11 prior art identified to Ms. Jacobsen and Headwater in the  
12 course of prosecution of the patent.

13 And you'll also see, Your Honor, that the  
14 paragraph there contains text indicating that the memo is  
15 prepared in accordance with company policy.

16 So, you know, to put it quite simply, the  
17 memorandum is requested by the client here, Headwater, and  
18 the memorandum is prepared by house counsel, Ms. Jacobsen.

19 THE COURT: It looks to me that it covers some  
20 40-some references, and each -- there's one section on each  
21 reference. The section starts with the description of the  
22 reference and then has a conclusion that appears to  
23 constitute the author's recommendations about the effect of  
24 this art on the application that is being considered for  
25 submission to the PTO.

09:31:05 1 MR. TSUEI: Yes, sir. Ms. Jacobsen would not  
09:31:07 2 disagree with that characterization of the contents of the  
09:31:11 3 document.

09:31:11 4 I will only note, in addition, that the analysis  
09:31:15 5 that the attorney performed to support the conclusion is  
09:31:19 6 not only contained in the section that's labeled  
09:31:23 7 "Conclusion," there's, in fact, analysis about the prior  
09:31:26 8 art and certain limitations in the sections that discuss  
09:31:28 9 the reference, as well, above the sections that are labeled  
09:31:32 10 "Conclusion."

09:31:32 11 THE COURT: All right. I think that is a fair  
09:31:38 12 understanding.

09:31:39 13 And I'm looking at the way you have logged this.  
09:31:49 14 It does not, as some of the entries do, refer to this as a  
09:31:54 15 communication. Why is that?

09:31:56 16 MR. TSUEI: Yes, sir. It's because -- as  
09:31:59 17 Mr. Fenster indicated during the last hearing, these  
09:32:01 18 documents are not, in fact, emails or attachments to  
09:32:04 19 emails. And so in the course of our collection and review  
09:32:07 20 of the documents, we're not aware, just based on the  
09:32:11 21 collection process and the nature of the loose electronic  
09:32:14 22 files, that they were, in fact, communications.

09:32:16 23 But upon further review, and specifically I think  
09:32:20 24 a day or two prior to the last hearing, we conducted an  
09:32:24 25 additional review of the documents, and during the hearing

09:32:26 1 represented to the Court that these were loose electronic  
09:32:29 2 files. So these were for the most part Word documents that  
09:32:32 3 had not been attached but ultimately we understand were  
09:32:37 4 attached in other communications to the client.

09:32:38 5 So that's the reason why, Your Honor, that for the  
09:32:41 6 privilege log here, at least in the first version and the  
09:32:46 7 amended version, we didn't identify it as a communication,  
09:32:49 8 but in the course of the parties' colloquy and during the  
09:32:53 9 discussion during the last hearing, we did, in fact,  
09:32:55 10 represent to both Your Honor and Samsung that these were  
09:32:58 11 communications.

09:32:59 12 So we apologize if there's any, I guess, ambiguity  
09:33:03 13 as to the nature of these documents. But, you know, at the  
09:33:06 14 end of the day, we understand the content of the documents  
09:33:08 15 also speak for themselves.

09:33:09 16 THE COURT: All right. Thank you, Mr. Tsuei.

09:33:13 17 MR. TSUEI: Thank you, Your Honor.

09:33:18 18 THE COURT: Mr. Graubart, if you want to offer any  
09:33:21 19 argument about it, it is clear to me that the document is  
09:33:27 20 prepared as a communication. And I guess the issue that  
09:33:32 21 Mr. Tsuei just raised is whether or not it was actually  
09:33:39 22 ultimately communicated as opposed to somehow just left in  
09:33:45 23 a file.

09:33:47 24 But other than that, it certainly has all the  
09:33:51 25 earmarks of a privileged communication.

09:33:54 1 MR. GRAUBART: Your Honor, of course, we'll defer  
09:33:56 2 to Your Honor's impressions of it from having seen it, and  
09:34:00 3 if it appears that this was prepared as a communication,  
09:34:03 4 then that -- if it was, in fact, a communication to a  
09:34:06 5 client, then that would be privileged.

09:34:08 6 All I can say is that, you know, this -- there  
09:34:12 7 wasn't evidence in the record until this very moment when  
09:34:15 8 Your Honor is looking at this to support that it had --  
09:34:18 9 that any of these were communications to a client.

09:34:20 10 Mr. Raleigh from Headwater -- by the way, there's  
09:34:24 11 no evidence from Ms. Jacobsen. She didn't offer any  
09:34:24 12 declaration or anything.

09:34:29 13 Mr. Raleigh, who doesn't say he's ever looked at  
09:34:31 14 any of these documents, gave a general declaration saying,  
09:34:33 15 you know, my lawyers did things internally at Headwater,  
09:34:36 16 and it was intended to be privileged.

09:34:38 17 So it's -- it's -- I can take Mr. Tsuei at his  
09:34:41 18 word and what Your Honor sees, but you can understand from  
09:34:45 19 Samsung's perspective, until this moment, there was  
09:34:48 20 nothing -- there still wasn't record evidence for us to go  
09:34:52 21 on concluding that this was communication.

09:34:54 22 THE COURT: So you're just saying this is an entry  
09:34:57 23 that doesn't use the word "communication."

09:35:00 24 Did you raise that issue with Plaintiff's counsel  
09:35:02 25 that there are entries in the log that don't describe the

09:35:09 1 document as a communication?

09:35:10 2 MR. GRAUBART: We raised that the log itself was  
09:35:15 3 very unhelpful, very vague descriptions, doesn't identify a  
09:35:19 4 recipient or, you know, a client, that at the time of the  
09:35:23 5 briefing, there was, in fact, no assertion of even  
09:35:26 6 attorney-client privilege.

09:35:27 7 And the first time we heard about these buckets  
09:35:30 8 and the fact that these were allegedly memoranda was, you  
09:35:34 9 know, as Mr. Tsuei said, a day or two before the last  
09:35:37 10 hearing, and none of it was supported by evidence in the  
09:35:40 11 record.

09:35:41 12 And -- and so if -- if -- to the extent that they,  
09:35:46 13 in fact, do reflect that, then -- then that's the result.  
09:35:50 14 But, you know, Samsung had not been in a position to  
09:35:54 15 evaluate that, and it wasn't supported by anything  
09:35:56 16 Headwater had provided to us --

09:36:01 17 THE COURT: You --

09:36:02 18 MR. GRAUBART: -- or Ms. Jacobsen --

09:36:04 19 THE COURT: -- received the privilege log that  
09:36:06 20 we're looking at now -- the one that was filed in the  
09:36:09 21 miscellaneous action, you received that when it was filed  
09:36:12 22 on March 13th?

09:36:13 23 MR. GRAUBART: I think we even received it by  
09:36:15 24 service a little earlier than that when Headwater -- or  
09:36:18 25 when Ms. Jacobsen filed her opposition in California.

09:36:21 1 THE COURT: All right. And have you raised with  
09:36:26 2 Plaintiff any insufficiencies in that log?

09:36:30 3 MR. GRAUBART: Yes. We raised that -- up until  
09:36:33 4 that point, there had never been an assertion of  
09:36:37 5 attorney-client privilege and that even the assertion --  
09:36:39 6 the new assertion --

09:36:41 7 THE COURT: I'm sorry. Maybe I sound impatient,  
09:36:43 8 but I asked a specific question.

09:36:45 9 Have you raised insufficiencies in the log, not  
09:36:49 10 whether up until then there had been an assertion of work  
09:36:53 11 product or privilege?

09:36:54 12 MR. GRAUBART: I believe so, Your Honor. I -- my  
09:36:58 13 memory is -- to the best of my memory, we articulated that  
09:37:02 14 the revised log still did not demonstrate the -- the --  
09:37:09 15 that any of these were communications to or from a client.

09:37:12 16 THE COURT: Well, there are lots of entries on  
09:37:17 17 this 270-page log that I'm looking at that say  
09:37:22 18 communication.

09:37:29 19 MR. GRAUBART: The ones that were at issue in this  
09:37:34 20 motion, Your Honor, are -- there are 580 of them, and they  
09:37:38 21 all are ones in which there is no -- there's only one  
09:37:44 22 person reflected in either the author or recipient column.  
09:37:49 23 And I don't believe, if you find those entries, any of them  
09:37:54 24 say communication.

09:37:55 25 So you're right, Your Honor, that there are ones



09:37:57 1 that have an email from so-and-so to so-and-so, and it says  
09:38:03 2 communication. Those we weren't challenging.

09:38:05 3 THE COURT: So this is all about the fact that as  
09:38:07 4 to those entries, which you've described as 580, there is  
09:38:13 5 no indication in the log that it's a communication?

09:38:18 6 MR. GRAUBART: That's right. That is a fair  
09:38:22 7 description of those entries.

09:38:25 8 THE COURT: All right. Thank you, Mr. Graubart.  
09:38:27 9 Let me hear from Mr. Tsuei.

09:38:36 10 Mr. Tsuei, are you now indicating that after  
09:38:39 11 further review, those -- I'm assuming the Defendant's  
09:38:44 12 correct -- 580 entries actually are communications?

09:38:48 13 MR. TSUEI: Unfortunately, Your Honor, the answer  
09:38:53 14 is probably more complex than I can fit in one sentence.  
09:38:56 15 So just a quick couple of parameters to scope the  
09:39:01 16 discussion here.

09:39:01 17 It's not 580 entries that are at issue here. That  
09:39:06 18 was the number of entries that were initially implicated by  
09:39:09 19 Samsung's request for relief in its opening motion.

09:39:11 20 That number of entries has since been dramatically  
09:39:16 21 cut because for one reason or another, entries have been  
09:39:19 22 produced, whether through agreement or by order of the  
09:39:22 23 Court, and so the number of entries, although I don't have  
09:39:24 24 the exact number, is significantly smaller.

09:39:27 25 So to answer the meat of Your Honor's question,

09:39:31 1 that is whether or not we can represent that the remaining  
09:39:33 2 entries are all communications, the answer to that is also  
09:39:38 3 unfortunately complicated.

09:39:39 4 Many of the entries are, in fact, formal  
09:39:42 5 communications and along the lines of the memoranda to the  
09:39:45 6 company that Your Honor reviewed. Some, however, are Word,  
09:39:51 7 I guess, document copies of instructions to counsel,  
09:39:55 8 outside counsel, as opposed to the company, and other  
09:39:57 9 documents are attachments that Ms. Jacobsen prepared to  
09:40:01 10 send to outside counsel, typically in preparation of  
09:40:05 11 prosecuting this or that patent family.

09:40:08 12 So it's that last category of documents which from  
09:40:12 13 the face of them don't appear to immediately be  
09:40:15 14 communications, but there are indicia in many of the  
09:40:19 15 documents suggesting that they, in fact, are.

09:40:21 16 So, for instance, the Word documents that contain  
09:40:24 17 draft claims with redlines and track changes may also have  
09:40:29 18 comments in many of them that have the initials of this or  
09:40:32 19 that attorney. And it's those documents, which although  
09:40:36 20 strictly speaking are not emails or I guess notes from one  
09:40:38 21 person to another, they constitute in our view also  
09:40:41 22 communications and at minimum the disclosure of which would  
09:40:47 23 reveal the content of privileged communications.

09:40:49 24 THE COURT: If they constitute, in your view,  
09:40:51 25 communications, why haven't you logged them as

09:40:53 1 communications?

09:40:54 2 MR. TSUEI: That's a fair question, Your Honor.

09:40:56 3 It's because we understood that -- through our  
09:41:00 4 representations to both Samsung and the Court during the  
09:41:03 5 last hearing that that I suppose obligation had been  
09:41:07 6 satisfied.

09:41:08 7 But if Your Honor is suggesting that we, in fact,  
09:41:11 8 amend the privilege log to specifically identify them as  
09:41:14 9 either communications or information reflecting  
09:41:17 10 communications, that's something we, of course, can easily  
09:41:20 11 do. And we understood that, you know, if that's what  
09:41:23 12 Samsung was wanting, that we would, in fact, do that.

09:41:26 13 To address, I think, a related point that  
09:41:29 14 Your Honor asked Mr. Graubart, which was whether or not  
09:41:32 15 Samsung had specifically raised any deficiencies with the  
09:41:37 16 amended privilege log, you know, I know that Mr. Graubart  
09:41:40 17 represented that his understanding was that it had, I  
09:41:43 18 believe the answer is, in fact, no, that it has not. But  
09:41:47 19 at the end of the day if what they're asking for is an  
09:41:49 20 updated description of the entries as, in fact, being  
09:41:53 21 communications, we don't have a problem with that.

09:41:54 22 THE COURT: Well, what I just heard from  
09:41:57 23 Mr. Graubart was that the entries that they are challenging  
09:42:01 24 today are the ones that don't indicate in the log that they  
09:42:07 25 are communications.

09:42:09 1 MR. TSUEI: That's right.

09:42:11 2 THE COURT: Which sounds to me like they are  
09:42:14 3 relying upon a deficiency in the log.

09:42:18 4 MR. TSUEI: Yeah. I think that's a fair  
09:42:21 5 characterization of what Samsung's position is currently as  
09:42:24 6 it's fleshed out in today's hearing.

09:42:26 7 My point, Your Honor, was merely that in response  
09:42:29 8 to a question that you posed to Mr. Graubart, if the  
09:42:31 9 parties had specifically discussed the deficiency in this  
09:42:35 10 amended privilege log, I believe the answer was no.

09:42:38 11 But since we're here today and having that  
09:42:40 12 discussion, you know, again, I think Ms. Jacobsen can quite  
09:42:45 13 easily, very quickly provide a second amended log with that  
09:42:47 14 description.

09:42:48 15 THE COURT: It's remarkable to me that only in  
09:42:50 16 this room in Marshall, Texas, are counsel able to  
09:42:54 17 communicate about this issue.

09:42:59 18 I'll go through a few more of these, but I'm going  
09:43:10 19 to require that you amend your privilege log in order to  
09:43:17 20 take a position on whether or not these are communications.  
09:43:21 21 If you do not have sufficient information to take the  
09:43:25 22 position that it's a communication, then you're going to  
09:43:28 23 have to produce it. You can't withhold it from production  
09:43:36 24 because it might be privileged. You have to take a  
09:43:40 25 position on whether or not it is privileged.

09:43:43 1 And the log needs to reflect the basis for that  
09:43:49 2 assertion. And I would agree that if it is a  
09:43:57 3 communication, it should say who the author is or at least  
09:44:02 4 one of the authors and who the recipient is, at least one  
09:44:07 5 of the recipients, sufficient to show that there is a  
09:44:12 6 communication of information between attorney and client.

09:44:17 7 And certainly you can rely upon information from  
09:44:22 8 Ms. Jacobsen or from your client in making that  
09:44:27 9 determination. And it sounds to me like you're being  
09:44:32 10 careful about it, which is certainly appropriate. But you  
09:44:38 11 still ultimately have to take a position and reflect that  
09:44:43 12 in your log.

09:44:44 13 MR. TSUEI: Yes, sir. We understand.

09:44:46 14 We apologize for not having served an amended log  
09:44:50 15 containing that information. We will note, though, that  
09:44:55 16 Samsung knows that our position has been all along that  
09:44:58 17 these were communications since that was, in fact, one of  
09:45:00 18 the points that we discussed at length during the last  
09:45:03 19 hearing.

09:45:03 20 But we appreciate and understand Your Honor's  
09:45:06 21 concern, and we're willing to serve an amended privilege  
09:45:09 22 log containing that information.

09:45:10 23 THE COURT: All right. Well, thank you,  
09:45:14 24 Mr. Tsuei.

09:45:14 25 Let me give Mr. Graubart the opportunity to have a

09:45:22 1 few more of these examined.

09:45:26 2 What else do you want the Court to look at,  
09:45:29 3 Mr. Graubart?

09:45:29 4 MR. GRAUBART: What I'm wrestling with, Your  
09:45:44 5 Honor, is whether to ask you to look at any more in that  
09:45:47 6 category. I think in the interest of time what I'd do is  
09:45:50 7 select one from one of the other buckets, and if we move  
09:45:55 8 to --

09:45:55 9 THE COURT: I can tell you that the -- the ones  
09:45:59 10 that are in this notebook that I've been provided for in  
09:46:05 11 camera review, all of the ones I'm looking at that are  
09:46:11 12 similar documents, analysis of prior art, are materially  
09:46:18 13 the same as what I described before. They are certainly  
09:46:28 14 the attorneys' analysis and recommendations to someone who  
09:46:33 15 I assume is the client.

09:46:36 16 But go ahead. What's your next --

09:46:38 17 MR. GRAUBART: Okay. So I turn to Category No. 4,  
09:46:42 18 there is a -- an entry of 589737, which is on ECF Page 261.

09:48:02 19 THE COURT: I'm attempting to locate it in the  
09:48:04 20 notebook here.

09:48:05 21 MR. GRAUBART: Mr. Tsuei, perhaps -- is this  
09:48:08 22 perhaps one that you only brought electronically?

09:48:11 23 MR. TSUEI: Yeah, we can show it to the Court  
09:48:14 24 electronically. This should be printed as far as I  
09:48:16 25 understand.

09:48:16 1 But it is an Excel spreadsheet, Your Honor, so if  
09:48:19 2 there's an explanation for why it's not included, that may  
09:48:22 3 be the case. It may have been too long or too big to  
09:48:27 4 include in printed copy.

09:48:28 5 THE COURT: All right. No, I have found 589737,  
09:48:38 6 and let me see, it says: Native document placeholder. But  
09:48:42 7 there is a copy of, I guess, one page of it that is in the  
09:48:48 8 notebook.

09:48:48 9 But let me see -- and that one page does not have  
09:48:57 10 a separate Bates number or other indication on it.

09:49:05 11 But, Mr. Tsuei, is the Court to understand that  
09:49:11 12 the rest of the Excel spreadsheet would be pages similar to  
09:49:17 13 the one that is contained behind the placeholder sheet?

09:49:21 14 MR. TSUEI: Unfortunately, Your Honor, I've not  
09:49:24 15 had a chance to physically inspect the binder since it was  
09:49:29 16 delivered to the Court yesterday when we were still in  
09:49:31 17 transit.

09:49:32 18 THE COURT: Let me pass this down to you, then,  
09:49:34 19 and ask you to tell me if this reflects what the rest of  
09:49:40 20 the document would show.

09:50:03 21 MR. TSUEI: Your Honor, just looking at my native  
09:50:06 22 copy here, it looks like the one-page printout is an  
09:50:09 23 accurate printout. However, it does not appear to contain,  
09:50:14 24 it looks like, all the columns that are in the spreadsheet.

09:50:19 25 THE COURT: All right. Then if you can bring it

09:50:21 1 up electronically or however else you can show it to me.

09:50:47 2 MR. TSUEI: Yeah. You know what, let me -- well,  
09:50:48 3 actually since Samsung's counsel are in the room, at least  
09:50:51 4 for in camera review purposes, if we wanted to put it on  
09:50:55 5 the board, we'd ask Samsung to step out.

09:50:57 6 THE COURT: Well, I'll tell you what, we'll take a  
09:50:59 7 break and get IT to get me a device that I can look at this  
09:51:06 8 with.

09:51:09 9 MR. GRAUBART: I wouldn't object to just handing  
09:51:12 10 up your own laptop, if you're comfortable.

09:51:14 11 MR. TSUEI: Yeah, I think that's fine. Let me  
09:51:16 12 just set up the view for the Court.

09:51:19 13 THE COURT: Well, all right.

09:51:25 14 MR. TSUEI: Well, okay. And we're off the record.  
09:51:32 15 Permission to approach?

09:51:32 16 THE COURT: Yes.

09:51:33 17 We'll go off the record while we do this. Go  
09:51:35 18 ahead.

09:51:42 19 (Recess.)

09:52:39 20 THE COURT: All right. Mr. Tsuei has handed me  
09:52:42 21 his laptop which has the selected document on the display,  
09:52:55 22 and that's Entry No. 589737 of the privilege log.

09:53:02 23 And go ahead and explain to me, if you would,  
09:53:07 24 Mr. Tsuei, the features of the document that show it is  
09:53:17 25 privileged.



09:53:17 1 MR. TSUEI: Yes, sir.

09:53:18 2 So I believe this is Bucket 4, and we've  
09:53:23 3 previously represented to the Court that these are internal  
09:53:27 4 spreadsheets maintained by in-house counsel with respect to  
09:53:30 5 the status of and the strategy for pending patent  
09:53:34 6 prosecutions.

09:53:35 7 I regret to say that this particular spreadsheet  
09:53:40 8 probably is not completely representative of the kinds of  
09:53:44 9 information that are contained in the documents in this  
09:53:46 10 category, but it is sufficiently similar enough that it can  
09:53:49 11 be used as a good starting point for the discussion.

09:53:52 12 So the document in question -- I apologize, Your  
09:53:57 13 Honor. Without having the document in front of me, I may  
09:54:00 14 misspeak about the contents, and so to the extent that  
09:54:03 15 there are any inaccuracies, I hope to correct them in due  
09:54:06 16 course.

09:54:06 17 So the spreadsheet Your Honor is looking at is a  
09:54:11 18 compilation of the status of the patent prosecutions of  
09:54:15 19 several patent families, and it contains the attorney's  
09:54:18 20 notes about the current status of this or that patent  
09:54:22 21 prosecution and I believe also contains certain notes about  
09:54:27 22 the priority claims for each of them that they'd like to  
09:54:30 23 maintain with the Patent Office as well.

09:54:32 24 THE COURT: So you're representing that the fields  
09:54:36 25 within this spreadsheet are maintained or populated by

09:54:44 1 Ms. Jacobson?

09:54:44 2 MR. TSUEI: Yes, Your Honor. That's, in fact,  
09:54:46 3 what we're representing. And we've confirmed that  
09:54:49 4 separately with both representatives of Headwater who are  
09:54:54 5 percipient witnesses to the creation of these spreadsheets,  
09:54:57 6 as well as Ms. Jacobson herself.

09:55:01 7 THE COURT: And how are they communicated to the  
09:55:03 8 client?

09:55:04 9 MR. TSUEI: So as Your Honor may have seen from  
09:55:06 10 the declaration of Dr. Raleigh that was attached to the  
09:55:08 11 briefing for this particular motion, documents such as  
09:55:11 12 these, including, in fact, I believe the one that you're  
09:55:13 13 looking at, were the subject of discussions in person at  
09:55:17 14 the office -- that is, the Headwater's office in Redwood  
09:55:22 15 Shores, California -- on a regular basis for a number of  
09:55:24 16 years.

09:55:24 17 And we can represent that it's documents such as  
09:55:27 18 these which both Dr. Raleigh and Ms. Jacobson looked at  
09:55:32 19 while determining the strategy for how to proceed with  
09:55:36 20 certain patent prosecutions.

09:55:37 21 Now, Your Honor is actually quite correct to suss  
09:55:40 22 out, you know, the real issue. Is there an indicia of this  
09:55:44 23 being communicated or containing or reflecting a  
09:55:48 24 communication? And, unfortunately, it does not because  
09:55:50 25 there's no column that says attorney-client, you know,

09:55:53 1 communications or comments here.

09:55:54 2 But our position has and has always been that the  
09:55:59 3 subject of the information in this spreadsheet was the  
09:56:01 4 subject of the communications between the client and the  
09:56:04 5 counsel.

09:56:05 6 And since we're on this same bucket, Your Honor,  
09:56:09 7 there are, in fact, other spreadsheets of a similar nature  
09:56:13 8 selected by Samsung which do, in fact, have columns  
09:56:16 9 containing the attorney's comments -- that is, the  
09:56:21 10 communication -- communications from the attorney to the  
09:56:23 11 client. And if Your Honor would so please can quite easily  
09:56:27 12 look at them and confirm for itself that there are, in  
09:56:30 13 fact, such communications.

09:56:34 14 THE COURT: And are you representing that counsel  
09:56:39 15 and the client, Headwater, were the only ones who had  
09:56:46 16 regular access to these spreadsheets?

09:56:49 17 MR. TSUEI: Yes, sir. That's what we can  
09:56:52 18 represent, I think, with certainty.

09:56:56 19 THE COURT: All right. I am not as adept as you  
09:57:22 20 are at causing this document to scroll.

09:57:26 21 But, all right, let me hear what counsel for  
09:57:30 22 Defendant has to say about the assertion.

09:57:33 23 MR. GRAUBART: So as I understand it, Your Honor,  
09:57:38 24 that there's nothing on these -- this document that  
09:57:40 25 provides an indicia that it was, in fact, communicated to

09:57:43 1 or from a client. It sounds like there are -- that this  
09:57:47 2 particular document, the first one selected, didn't even  
09:57:49 3 have the attorney's notes.

09:57:51 4 Mr. Tsuei is representing that there are others in  
09:57:54 5 this category that do have the attorney's notes.

09:57:56 6 THE COURT: Well, it is my understanding that many  
09:58:01 7 of these columns are the attorney's notes. There are notes  
09:58:06 8 about the status of the applications here, what -- that  
09:58:13 9 they're awaiting certain things, that certain filings were  
09:58:17 10 made as of certain dates, that -- whether an examiner has  
09:58:22 11 been assigned yet and other things of that nature about the  
09:58:31 12 various patent applications that are described.

09:58:35 13 MR. GRAUBART: What it sounds to me like, Your  
09:58:38 14 Honor, is a description of a patent prosecutor's own  
09:58:44 15 created documentation of her own notes for herself, that  
09:58:49 16 the only indication that there may have been -- that this  
09:58:52 17 would have reflected a communication to a client for the  
09:58:56 18 purpose of legal advice is counsel's representation that  
09:58:58 19 Mr. Raleigh says they discussed these at meetings.

09:59:02 20 But his declaration is very general. It doesn't  
09:59:04 21 even indicate that he looked at any of these documents  
09:59:07 22 before creating them -- before creating that declaration.  
09:59:10 23 He just says that the lawyers in-house did create things  
09:59:14 24 that they discussed.

09:59:15 25 And while Mr. Tsuei is now saying that

09:59:18 1 Ms. Jacobson confirmed that, there's nothing in the record  
09:59:21 2 from Ms. Jacobson. And, in fact, during our meet and  
09:59:23 3 confer prior to the previous hearing, Mr. Fenster  
09:59:25 4 represented that they didn't have, quote, full access to  
09:59:30 5 Ms. Jacobson. And so it's -- it's -- you know, what we  
09:59:34 6 have is a record that seems to reflect notes. And, yes,  
09:59:37 7 it's possible these were communicated to a client. We  
09:59:40 8 don't have any evidence of that.

09:59:46 9 THE COURT: Did you take the deposition of  
09:59:47 10 Ms. Jacobson?

09:59:48 11 MR. GRAUBART: No, we've been waiting to have this  
09:59:50 12 issue resolved, Your Honor, so we'd have the documents for  
09:59:52 13 that deposition.

09:59:53 14 THE COURT: All right. Well, I don't have any  
10:00:25 15 basis to conclude that the representation that these  
10:00:34 16 spreadsheets were made available to the client when --  
10:00:40 17 Ms. Jacobson was employed by Headwater at the time she made  
10:00:42 18 these, right?

10:00:43 19 MR. GRAUBART: She worked both in-house and then  
10:00:45 20 as an outside counsel. This particular one was 2015. I  
10:00:51 21 believe by that point, she was outside counsel, but I -- I  
10:00:54 22 am not a hundred percent positive.

10:00:56 23 THE COURT: Okay. Well, I'm going to find that  
10:01:12 24 there is a sufficient basis for the assertion of the  
10:01:14 25 privilege on this.

10:01:15 1 If you, during the deposition of Ms. Jacobson,  
10:01:19 2 determine that, in fact, this information on these  
10:01:25 3 spreadsheets was not something communicated to the client,  
10:01:32 4 then you can come back.

10:01:35 5 But, frankly, it's unusual to me to see discovery  
10:01:45 6 of the sort we're dealing with here directed at in-house  
10:01:52 7 counsel. And so it's easy for me to make the assumption  
10:02:01 8 that the representation being made by the Plaintiff is  
10:02:04 9 accurate.

10:02:10 10 What else do you have?

10:02:11 11 MR. GRAUBART: Your Honor, if I understand  
10:02:21 12 Your Honor correctly that the documents that on their face  
10:02:24 13 don't have an indicia of them being communications but  
10:02:28 14 Your Honor's accepting counsel's representation for all of  
10:02:33 15 them that they -- that they were communicated to clients,  
10:02:35 16 then I think that that may resolve all of the documents on  
10:02:39 17 the log because that was the -- the issue in dispute that,  
10:02:44 18 in fact, the question was whether these documents, in fact,  
10:02:47 19 bear that indicia.

10:02:48 20 THE COURT: Well, what I'll do is order that  
10:02:55 21 Plaintiff file an amended log that makes the representation  
10:03:02 22 that the documents are communications as long as the  
10:03:07 23 Plaintiff has a basis for that. And if the Plaintiff  
10:03:11 24 determines that there are documents on the log that it has  
10:03:16 25 no basis to represent are communications with the client,

10:03:25 1 then those -- the Plaintiff will be ordered to produce or  
10:03:33 2 establish the basis why they wouldn't be. But...

10:03:44 3 MR. GRAUBART: Understood. Thank you, Your Honor.

10:03:45 4 THE COURT: All right. Mr. Tsuei, I will tender  
10:03:47 5 you back your laptop.

10:03:51 6 MR. BUNT: May I approach, Your Honor?

10:03:52 7 THE COURT: Yes.

10:04:15 8 How much time do you need, Mr. Tsuei, to file your  
10:04:19 9 amended privilege log?

10:04:21 10 MR. TSUEI: Well, having thought about it for just  
10:04:28 11 a brief moment, Your Honor, I would expect us to be able to  
10:04:31 12 do that likely within two weeks. We'd like a chance to do  
10:04:37 13 our due diligence, revisit with Ms. Jacobson, and also with  
10:04:40 14 our client, Headwater, to confirm that we do have a  
10:04:43 15 good-faith basis to maintain an assertion.

10:04:47 16 And we -- we'll also say that to the extent that  
10:04:49 17 we're not able to determine after investigating with our  
10:04:51 18 clients that there is not a good-faith basis, we do intend  
10:04:55 19 to produce those documents to Samsung with the  
10:04:58 20 understanding that they not be used against either  
10:05:02 21 Ms. Jacobson or Headwater as evidence of a waiver of  
10:05:04 22 privilege.

10:05:06 23 THE COURT: Well, as I pointed out a couple of  
10:05:11 24 times, Ms. Jacobson can't waive Headwater's privilege. But  
10:05:20 25 certainly if you produce them, it'll be a waiver of the

10:05:23 1 privilege as to those documents, but it will not be a  
10:05:27 2 subject matter waiver.

10:05:28 3 MR. TSUEI: Yes, sir.

10:05:29 4 THE COURT: All right. Is two weeks soon enough  
10:05:33 5 to make sure that it is done before the deposition of  
10:05:38 6 Ms. Jacobson?

10:05:38 7 MR. TSUEI: I think that's feasible, Your Honor,  
10:05:43 8 although I suppose Samsung's counsel will have to speak to  
10:05:45 9 how much time they need to prepare for the depo.

10:05:48 10 MR. GRAUBART: I believe counsel -- we've already  
10:05:50 11 been engaged in discussing scheduling that deposition in  
10:05:54 12 anticipation of having these rulings today. My best  
10:05:58 13 recollection is that the dates being discussed were in  
10:06:00 14 early May. So I guess what I would say is to the extent  
10:06:02 15 that counsel needs more time to prepare it, then we would  
10:06:06 16 just work with them to schedule the deposition at a time  
10:06:10 17 after having the log.

10:06:12 18 THE COURT: All right. Well, I'll order that the  
10:06:13 19 amended log be filed within two weeks from today and that  
10:06:18 20 the -- any additional production of items that are not  
10:06:24 21 properly logged on the amended log also be made within two  
10:06:27 22 weeks and that Ms. Jacobsen be presented for deposition  
10:06:34 23 after that period.

10:06:36 24 MR. TSUEI: Yes, Your Honor.

10:06:37 25 THE COURT: All right. What's the next motion



10:06:45 1 that we need to address?

10:06:55 2 MR. GRAUBART: Your Honor, if I may, sequentially,  
10:07:00 3 the first motion on the hearing -- the notice of hearing  
10:07:03 4 that was set is Docket No. 88. That's Samsung's motion to  
10:07:09 5 compel concerning Headwater's patent portfolio sale  
10:07:13 6 negotiations.

10:07:13 7 If it's -- if it's all right with Your Honor, if  
10:07:17 8 there's no objection from Headwater, what I'd propose that  
10:07:21 9 we do is address Docket No. 88, a portion of Docket  
10:07:26 10 No. 100, as well as Docket No. 137 because they  
10:07:31 11 collectively relate to -- they present the same dispute.

10:07:34 12 THE COURT: That's the common interest doctrine  
10:07:37 13 issue?

10:07:37 14 MR. GRAUBART: It is. And more particularly,  
10:07:40 15 Judge, it's the application of the common interest doctrine  
10:07:42 16 with respect to communications concern -- with  
10:07:46 17 InterDigital. So that -- this would be the InterDigital  
10:07:49 18 subject matter encompassed by Docket 88, Docket 137, and  
10:07:55 19 aspects of Docket 100.

10:07:56 20 THE COURT: All right. Go ahead.

10:07:59 21 MR. GRAUBART: Ms. Andrews, would it be possible  
10:08:06 22 to switch the feed? Yes. Thank you.

10:08:08 23 So what is this all about? Your Honor may be  
10:08:11 24 familiar with a company called InterDigital. They're a  
10:08:14 25 large patent monetization business.

1 In 2019, Headwater and InterDigital began  
2 negotiating the sale of Headwater to InterDigital.

3 They negotiated for a few months, and eventually  
4 they signed a letter of intent in early 2020 for Headwater  
5 to sell the whole company to InterDigital for \$60 million,  
6 as well as the ability for Headwater to buy some additional  
7 stock in InterDigital.

8 So Headwater was willing to sell its entire  
9 company, including its patents, for \$60 million. It agreed  
10 to do that. However, after InterDigital did some more due  
11 diligence, including learning about some prior art that --  
12 that Samsung contends Headwater withheld from the Patent  
13 Office, InterDigital ultimately backed out of the deal.

14 They said: Headwater, you might be willing to accept \$60  
15 million for this, but we're not willing to pay that much.

16 And so throughout this negotiation, Headwater and  
17 InterDigital exchanged communications and other materials.  
18 Initially, Headwater didn't disclose any of this to  
19 Samsung. We learned about it by taking the deposition of a  
20 third-party, Mr. James Harris. He used to be the general  
21 counsel of Headwater after Ms. Jacobson. He also served as  
22 the acting CEO of Headwater.

23 And what Mr. Harris revealed, he explained that  
24 this -- this story about InterDigital. So Samsung  
25 immediately requested that Headwater provide documentation

10:09:38 1 about it. Initially, they didn't provide anything.

10:09:41 2 Eventually, after Samsung moved to compel --

10:09:44 3 that's Docket No. 88 -- Headwater produced some documents

10:09:48 4 about it -- about this history, but not everything. They

10:09:51 5 are still withholding, I think, approximately a hundred

10:09:55 6 entries on its privilege log that reflect communications

10:09:57 7 with InterDigital.

10:09:59 8 Headwater says these are protected by the common

10:10:02 9 legal interest exception to waiver, and that's the heart of

10:10:06 10 this dispute, whether that common interest exception

10:10:08 11 applies.

10:10:08 12 So why does this matter to the case? Two -- two

10:10:12 13 reasons. One, most obviously, it's relevant to the issue

10:10:16 14 of damages. Samsung's -- you know, Headwater valued its

10:10:20 15 whole company, including its patents, at \$60 million.

10:10:25 16 Its damages expert now says that Samsung would

10:10:28 17 have sat down at the hypothetical negotiation with

10:10:31 18 Headwater. Instead of paying \$60 million for a

10:10:36 19 non-exclusive license to a small subset of the patents,

10:10:38 20 would have paid over \$3 billion.

10:10:42 21 So, obviously, there's a disconnect there. And

10:10:44 22 it's one that Samsung's --

10:10:46 23 THE COURT: When was this negotiation between

10:10:49 24 Headwater and InterDigital with respect to when these

10:10:55 25 patents were asserted against Samsung?

10:10:58 1 MR. GRAUBART: With respect to when they were  
10:10:59 2 asserted, I think it was with -- well, so the negotiations  
10:11:03 3 were like in early 2020. The lawsuit was filed in 2022. I  
10:11:10 4 expect Your Honor's interested in the question of a  
10:11:12 5 hypothetical negotiation, which I believe the parties agree  
10:11:16 6 would have been around 2016.

10:11:17 7 But importantly, as the experts opined, the --  
10:11:22 8 when Headwater approached InterDigital in 2020, they had  
10:11:25 9 previously spoken, and they said: Guess what, our  
10:11:29 10 portfolio is much more mature now. It's -- basically it's  
10:11:33 11 worth more now in 2020 than it was back when we talked in  
10:11:37 12 2016. So we think, if anything, this 60 million -- yes,  
10:11:41 13 it's a few years removed from the hypothetical negotiation  
10:11:41 14 but that the evidence shows that, in fact, back at the  
10:11:44 15 hypothetical negotiation, it would have been even lower.

10:11:47 16 THE COURT: Uh-huh.

10:11:47 17 MR. GRAUBART: So Samsung's expert, Dr. Ugone --  
10:11:52 18 this is on Slide 3 -- shows -- oh, and, Your Honor, we  
10:11:55 19 believe -- before Your Honor entered the courtroom handed  
10:12:00 20 up a copy of these slides.

10:12:01 21 On Slide 3, Dr. Ugone, Samsung's expert, explains  
10:12:06 22 that he views this \$60 million agreement from Headwater to  
10:12:09 23 be a conservative upper bound.

10:12:11 24 But what does Headwater's expert say? Not  
10:12:15 25 surprised to learn they disagree. Mr. Kennedy, from

10:12:18 1 Headwater, says: I don't find this letter of intent  
10:12:21 2 relevant at all. And -- and one reason he says that is  
10:12:24 3 that he says Dr. Raleigh, the CEO of Headwater, testified  
10:12:28 4 that he believed the downstream value of the stock options  
10:12:31 5 would have been worth hundreds of millions of dollars.

10:12:34 6 Now, that -- that particular testimony is at the  
10:12:37 7 heart of Docket No. 137 that we believe Headwater -- excuse  
10:12:42 8 me, Dr. Raleigh waived privilege regarding that because he  
10:12:45 9 explained that that was based on analysis from attorneys.

10:12:49 10 But putting that aside for a moment, this is why  
10:12:52 11 this matters. We have this -- this central dispute between  
10:12:55 12 the two damages experts that one says this evidence is --  
10:12:58 13 the whole portfolio was worth no more than 60 million, the  
10:13:01 14 other says it's irrelevant because there -- it was actually  
10:13:05 15 worth more than that to Headwater.

10:13:06 16 And so we want -- we think we're entitled to all  
10:13:10 17 the -- the communications that would bear on figuring out,  
10:13:14 18 well, how much was it really worth? Did Sam -- did  
10:13:17 19 Headwater and InterDigital actually discuss the value of  
10:13:20 20 these stock options? Is there evidence to support  
10:13:23 21 Dr. Raleigh's self-serving testimony that, oh, no, this is  
10:13:27 22 not 60 million, it's really hundreds of millions.

10:13:30 23 So in addition to damages, though, it also -- this  
10:13:33 24 bears on the inequitable conduct defense that Samsung has.  
10:13:36 25 We know that one of the things that was exchanged between

10:13:39 1 Sam -- excuse me, Headwater and InterDigital was a piece of  
10:13:42 2 prior art. And it's the same piece of prior art that is at  
10:13:45 3 the center of Samsung's inequitable conduct defense.  
10:13:49 4 It's -- it's a presentation that relates to an early  
10:13:52 5 version of Android.

10:13:53 6 And after that was exchanged between InterDigital  
10:13:57 7 and Headwater, InterDigital backed out of the deal.

10:14:00 8 Now, we don't know if that was the reason they  
10:14:02 9 backed out, we don't know if it was the only reason, but we  
10:14:06 10 know that Headwater's validity expert, Dr. de la Iglesia,  
10:14:12 11 says: Oh, this prior art isn't material. There's no  
10:14:13 12 evidence that Dr. Raleigh knew of it, that he knew it was  
10:14:15 13 material, or that he intended to withhold it. Well --

10:14:19 14 THE COURT: Now, who is Dr. Raleigh?

10:14:20 15 MR. GRAUBART: He is the CEO of Headwater, Your  
10:14:23 16 Honor, and the founder.

10:14:23 17 THE COURT: All right.

10:14:24 18 MR. GRAUBART: The -- there is -- so the  
10:14:29 19 communications between InterDigital and Headwater,  
10:14:31 20 particularly around this prior art reference, that's going  
10:14:35 21 to bear on whether that's accurate what Dr. de la Iglesia  
10:14:41 22 opines that, in fact, Mr. -- Dr. Raleigh didn't know  
10:14:46 23 anything about this presentation, it's not material, he  
10:14:49 24 didn't withhold it.

10:14:50 25 Is that what he told them, or did he say, I'm

1 aware of this and I -- and here's what happened. Who  
2 knows? But -- but this was a communication with a third  
3 party that we don't believe is privileged and -- but that's  
4 why it's relevant, as well, in addition to damages.

5 So Headwater claims these are privileged, even  
6 though they were disclosed to a third party, InterDigital.  
7 That third party had an adverse interest to Headwater.  
8 They were negotiating the potential purchase of the whole  
9 company and ultimately backed out.

10 This is not like a patent owner and an exclusive  
11 licensee coordinating on patent prosecution strategy.  
12 There is case law saying that could be protected by common  
13 legal interest.

14 This was a buyer and seller negotiating the sale  
15 of assets. It's not even a common commercial interest.  
16 They were negotiating across the table.

17 To support -- though, despite that, the claim of  
18 common legal interest, Headwater points primarily to this  
19 paragraph from the letter of intent with InterDigital. And  
20 I think the first thing that jumps out to us about this,  
21 Your Honor, is that on its face, it only applies to -- to  
22 the information Headwater shares with InterDigital. It  
23 doesn't just talk about communications from InterDigital to  
24 Headwater.

25 But I think even if it were a bilateral agreement,

1 the agreement alone can't thwart discovery. You know, two  
2 private parties can agree to whatever they want, but that  
3 doesn't make their documents and their information immune  
4 from discovery, just like parties can agree to  
5 nondisclosure agreements, but the Court's ability to have  
6 every man's evidence trumps that.

7 And so once you put aside this private agreement,  
8 the law is pretty uniform, particularly in this district,  
9 that materials exchanged in the context of a purchase and  
10 sale of patents or a company are not covered by a common  
11 legal interest.

12 Headwater bears the burden to establish the  
13 applicability of privilege here. They cite a handful of  
14 cases from outside this district. But we start with the  
15 Mondis versus LG case in 2011 from Judge Ward. He said:  
16 The documents about negotiating a potential sale of patents  
17 involve a situation where the parties' interests are,  
18 quote, adverse rather than common.

19 THE COURT: I don't think you need to cite further  
20 authority on that. I, at this point, would agree with you  
21 on whether there is, as far as the attorney-client  
22 privilege goes, a common legal interest between the  
23 potential buyer and the potential seller.

24 But talk to me a little more about what you need  
25 in order to make your point beyond the fact that -- that



10:17:42 1 Headwater was willing to sell for -- for the price that  
10:17:47 2 you're aware of, the 60 million.

10:17:49 3 MR. GRAUBART: Sure. Well, and just so I  
10:17:51 4 understood what Your Honor said there a moment ago that --  
10:17:53 5 you're saying you do agree that the common legal interest  
10:17:55 6 does not apply here?

10:17:57 7 THE COURT: I'll give the Plaintiff an opportunity  
10:17:59 8 to make their argument, but at this point, I think that is  
10:18:04 9 correct.

10:18:04 10 MR. GRAUBART: Okay. So here is -- so, first of  
10:18:07 11 all, I think that all that means -- it means all the  
10:18:11 12 communications between InterDigital and Headwater are not  
10:18:14 13 privileged. The most pointed example I can give  
10:18:18 14 Your Honor -- and, you know, those would include those  
10:18:21 15 about that prior art reference, but to your question about  
10:18:23 16 the \$60 million, this goes to the heart of, I think, what's  
10:18:27 17 at Docket No. 137.

10:18:29 18 So as -- as we discussed, what Dr. -- excuse me,  
10:18:34 19 what Mr. Kennedy, their -- Headwater's damages expert says  
10:18:38 20 is it's not the 60 million. Don't look at the 60 million.  
10:18:41 21 You should instead credit Mr. -- Dr. Raleigh's testimony  
10:18:46 22 that he thought that there were these stock options really  
10:18:49 23 worth hundreds of millions of dollars.

10:18:51 24 And we believe we're entitled to discovery as to  
10:18:55 25 what's the basis of this hundreds of millions of dollars.

10:18:57 1 THE COURT: All right. I understand that theory  
10:19:01 2 as well. That wouldn't necessarily make all the rest of  
10:19:05 3 the communications back and forth between Headwater and  
10:19:08 4 InterDigital relevant, but to the extent there are  
10:19:14 5 communications that bear on the downstream value of stock  
10:19:18 6 options, I understand that argument.

10:19:21 7 MR. GRAUBART: And it -- and it goes one step  
10:19:23 8 further, as well, Your Honor, that apart from the common  
10:19:27 9 legal interest, Dr. Raleigh then testified that the basis  
10:19:30 10 of that hundreds of millions was Headwater's own  
10:19:33 11 discussions with its attorneys. He put into issue that the  
10:19:38 12 attorneys told him that the damages that -- excuse me, that  
10:19:43 13 the -- that -- let me just show you the testimony, Your  
10:19:48 14 Honor.

10:19:48 15 So he says: There was a lot of internal  
10:19:50 16 conversations. We felt it was worth hundreds of millions.

10:19:54 17 And he said: There were scenario analyses  
10:19:57 18 considered. A portion of the payment was subject to future  
10:20:00 19 gains, and so we considered all of it.

10:20:02 20 And then he adds, unsolicited: Those were based  
10:20:05 21 on attorneys' analysis of what damages awards would look  
10:20:10 22 like, the damages awards that InterDigital would have  
10:20:13 23 collected using these patents.

10:20:14 24 So he -- this is the -- it's a classic sword and  
10:20:18 25 shield scenario. Mr. Raleigh is going to get on the stand

10:20:20 1 and say: Ladies and gentlemen of the jury, don't look at  
10:20:23 2 that 60 million, it's worth hundreds of millions because  
10:20:25 3 our attorneys told us it's worth hundreds of millions.

10:20:28 4 THE COURT: Well, what -- what that would tend to  
10:20:32 5 waive privilege on would be an analysis of damage awards  
10:20:38 6 and whether or not that exists. That's not something that  
10:20:45 7 would -- I would expect to find in the back and forth  
10:20:48 8 between InterDigital and Headwater?

10:20:50 9 MR. GRAUBART: That's fair, Your Honor. And  
10:20:52 10 that's why Docket 137 goes to the waiver of privilege  
10:20:55 11 between Inter -- excuse me, Headwater and its own counsel  
10:21:00 12 concerning the subject matter of the InterDigital purchase  
10:21:04 13 and this value -- this alleged valuation of hundreds of  
10:21:07 14 millions of dollars.

10:21:07 15 THE COURT: So I am back to the question of what  
10:21:10 16 is there in this back and forth, these hundred or more  
10:21:15 17 documents that you have a relevant need for beyond the \$60  
10:21:23 18 million figure that you've already gotten?

10:21:26 19 MR. GRAUBART: Well, it could be something that  
10:21:27 20 completely undercuts this self-serving statement about  
10:21:32 21 hundreds of millions. There could be a statement that says  
10:21:33 22 here are the stock option offers that we value at something  
10:21:35 23 much less. It could be a complete silence on that point,  
10:21:39 24 which would undercut Mr. Raleigh's later testament --  
10:21:44 25 test -- testimony that it's allegedly worth hundreds of

1 millions. There could be lots of other statements about  
2 the valuation of the company that could further undermine  
3 the suggestion that it was really worth hundreds of  
4 millions of dollars. There could also be lots of  
5 discussion about this prior art reference that -- that  
6 Samsung contends was withheld that would contradict Sam --  
7 Headwater's expert's testimony that there's no evidence of  
8 materiality or knowledge. We don't know what Mr. Raleigh  
9 may have said completely contrary to the story that  
10 Headwater's putting forth in opposition to the inequitable  
11 conduct.

12 THE COURT: If there are certain subjects that you  
13 believe are relevant and might be in these communications,  
14 then I think the appropriate way to get there is to request  
15 communications that relate to those subjects as opposed to  
16 I just want to look through all your communications to see  
17 for myself.

18 MR. GRAUBART: Well, respectfully, Your Honor, if  
19 they're not privileged and they relate to a subject matter  
20 that's at a -- at a point of dispute between the two  
21 experts, which is this sale, I think that Headwater had an  
22 obligation in the discovery order to produce them.

23 But I hear Your Honor's caution, and I -- at a  
24 minimum, we think that -- we request at least that much, at  
25 least the things that bear on those two things.

10:23:08 1 THE COURT: All right. And so the things that  
10:23:09 2 bear on those two statements, those would be anything that  
10:23:14 3 relates to stock options and what else?

10:23:20 4 MR. GRAUBART: Well, I would couch that a little  
10:23:23 5 more broadly, Your Honor, as anything that relates to a  
10:23:26 6 characterization of the total value to be received, whether  
10:23:30 7 it was the 60 million, the stock options, something that --  
10:23:33 8 anything about the characterization of the value to be  
10:23:35 9 received by Headwater.

10:23:37 10 THE COURT: All right.

10:23:38 11 MR. GRAUBART: And anything about the -- the prior  
10:23:43 12 art, in particular the Android prior art that's at the  
10:23:46 13 basis of Samsung's inequitable conduct claim.

10:23:50 14 THE COURT: There -- as I understand it now,  
10:23:56 15 there's a difference between what the -- what Dr. Raleigh  
10:24:01 16 was apparently referring to that the owner of the patents,  
10:24:06 17 be it Headwater or InterDigital, would receive from future  
10:24:11 18 damage awards versus this issue about what Headwater would  
10:24:18 19 receive in stock options in addition to the purchase price  
10:24:23 20 that they were seeking from InterDigital.

10:24:26 21 MR. GRAUBART: So the way it ties together, as I  
10:24:28 22 understand it, is Headwater was to receive \$60 million as  
10:24:32 23 well as the opportunity to purchase stock options in  
10:24:36 24 InterDigital.

10:24:37 25 And so Dr. Raleigh says, you take this -- you

10:24:42 1 know, follow the steps forward and say, okay, Headwater  
10:24:45 2 sells the patents to InterDigital, InterDigital goes and  
10:24:49 3 asserts them, InterDigital makes all kinds of money, the  
10:24:52 4 stock goes up, and now the stock options that Headwater had  
10:24:56 5 purchased are now worth lots of money, and voila, that is  
10:25:00 6 how he gets to hundreds of millions. That's how I  
10:25:02 7 understand the -- the chain of events there.

10:25:05 8 THE COURT: All right.

10:25:07 9 MR. GRAUBART: But we haven't seen any  
10:25:08 10 documentation to support it, and we know there's a lot of  
10:25:13 11 things held -- withheld as privilege communicated with  
10:25:17 12 InterDigital.

10:25:17 13 THE COURT: All right.

10:25:17 14 MR. GRAUBART: And that is everything with respect  
10:25:19 15 to InterDigital on those three motions, Your Honor.

10:25:22 16 THE COURT: Thank you, Mr. Graubart.

10:25:31 17 MR. TSUEI: James Tsuei for Headwater.

10:25:35 18 Do you mind taking down that slide? Thank you.

10:25:42 19 All right. So, Your Honor, I'll address the  
10:25:49 20 issues in what I consider to be a logical order and  
10:25:55 21 fashion. But if Your Honor has any specific questions to  
10:25:58 22 address before I begin, I'd be happy to hear them.

10:26:01 23 THE COURT: Start with the privilege issue.

10:26:02 24 MR. TSUEI: Sure. I hear what Your Honor is  
10:26:05 25 saying, and I'd like to try to turn Your Honor around about

10:26:09 1 the common interest exception issue.

10:26:11 2 So, you know, I don't want to say Your Honor is  
10:26:12 3 wrong, but I think there are --

10:26:14 4 THE COURT: You can say it.

10:26:15 5 MR. TSUEI: I think finding a no common interest  
10:26:21 6 exception to the waiver rule would apply here would be  
10:26:24 7 inconsistent with what the Federal Circuit found in the  
10:26:26 8 In re Regents case, as well as, as Mr. Graubart  
10:26:30 9 characterized, out-of-circuit cases, finding common  
10:26:32 10 interest exceptions to waiver to exist.

10:26:35 11 And, unfortunately, you know, there's no bright  
10:26:37 12 line easy cookie cutter approach to finding whether or not  
10:26:40 13 the exception applies, right? It requires looking at the  
10:26:43 14 facts in question and assessing whether or not the  
10:26:46 15 interests -- or rather the legal interests of the putative  
10:26:51 16 parties is sufficiently congruent such that the common  
10:26:54 17 interest exception should be found to apply.

10:26:56 18 That's typically, as we understand it, how the  
10:27:00 19 Courts apply the rule.

10:27:03 20 THE COURT: You know, one big difference is there  
10:27:04 21 are times when a privileged document is going to be shared  
10:27:12 22 with someone you're negotiating with. And the issue is, is  
10:27:16 23 the privilege on that document waived?

10:27:19 24 As I understand it, you're asserting that all the  
10:27:21 25 communications between the proposed seller and the proposed

10:27:25 1 buyer would be privileged. That's a very different thing  
10:27:28 2 than whether you waive the privilege on what was clearly a  
10:27:33 3 privileged document by showing it to someone you're  
10:27:37 4 negotiating with.

10:27:38 5 MR. TSUEI: Yes, sir. The point you make is  
10:27:41 6 actually the right one and an astute one.

10:27:43 7 We are not asserting privilege over all  
10:27:47 8 communications between Headwater and InterDigital. As  
10:27:50 9 Your Honor may have seen in the briefing, we, in fact, have  
10:27:52 10 produced the majority of the communications between  
10:27:55 11 Headwater and InterDigital as they relate to the  
10:27:59 12 negotiation of the economic terms of the deal after the  
10:28:02 13 letter of intent was signed.

10:28:02 14 And so I'm not quite sure why Mr. Graubart didn't  
10:28:05 15 mention that, instead characterizing our withholding as a  
10:28:09 16 complete one when, in fact, it is not.

10:28:11 17 So, Your Honor, what Headwater has actually done  
10:28:14 18 is much more narrow. We've withheld communications as well  
10:28:19 19 as materials exchanged between the parties specifically  
10:28:21 20 relating to the parties' discussions about whether the  
10:28:25 21 patents were valid and enforceable.

10:28:27 22 The reason why the parties were doing this was  
10:28:29 23 because they intended to have a future cooperative  
10:28:32 24 relationship to essentially create enforcement campaigns  
10:28:37 25 against prospective defendants.



10:28:38 1 It's those specific materials that we've withheld  
10:28:42 2 under the common interest exception to waiver. And so I'd  
10:28:45 3 just like to make that point to clarify for the Court.

10:28:48 4 THE COURT: So these are documents that were  
10:28:52 5 prepared internally by Headwater before the negotiations or  
10:28:57 6 during the negotiations, and you're asserting that those  
10:29:01 7 were privileged at the time, and the question is: Did  
10:29:05 8 showing those documents to InterDigital constitute a  
10:29:09 9 waiver?

10:29:09 10 MR. TSUEI: I think the answer is partially yes.

10:29:12 11 In addition to documents that Headwater created  
10:29:15 12 and which were shared with InterDigital specifically  
10:29:18 13 relating to the validity of the patents and enforcement of  
10:29:21 14 the patents, for instance, against prospective defendants,  
10:29:24 15 we've also withheld communications from InterDigital to  
10:29:29 16 Headwater about that subject matter.

10:29:30 17 So, for instance, if there was an email from  
10:29:33 18 McKool Smith representing InterDigital about this or that  
10:29:37 19 piece of prior art, we've withheld that under the common  
10:29:40 20 interest exception as it's been at minimum scoped out in  
10:29:45 21 the written agreement between the parties.

10:29:45 22 THE COURT: That -- so that would not be  
10:29:49 23 Headwater's privilege.

10:29:50 24 MR. TSUEI: It would, in fact, be I think both.  
10:29:54 25 In other words, the parties at that time those

10:29:55 1 communications were exchanged had attorneys on that chain  
10:29:58 2 communicating with one another.

10:29:59 3 So, for instance, coming back to the McKool  
10:30:03 4 attorney example representing InterDigital, there are  
10:30:06 5 communications we've withheld where they specifically had  
10:30:08 6 communicated with in-house counsel at Headwater  
10:30:11 7 specifically discussing the validity of patents, as well  
10:30:14 8 as, you know, whether or not this or that piece of prior  
10:30:17 9 art was relevant for consideration in the diligence period.

10:30:21 10 And so -- and we have maintained that the  
10:30:24 11 privilege of those discussions belongs to both parties.

10:30:28 12 And I'm not quite sure that this is pertinent to  
10:30:30 13 the Court's consideration, but what Samsung has also done  
10:30:33 14 is subpoena InterDigital to ask for those same  
10:30:36 15 communications, and InterDigital, for their part, have  
10:30:40 16 also, as far as I understand, withheld all communications  
10:30:41 17 as privileged as well.

10:30:46 18 So to the extent that there are multiple parties  
10:30:49 19 holding the privilege, my understanding is that all parties  
10:30:51 20 have asserted the privilege as well.

10:30:55 21 THE COURT: And where have you logged the  
10:31:01 22 documents that pertain to InterDigital that you are  
10:31:05 23 asserting are privileged?

10:31:05 24 MR. TSUEI: I'm not sure I could off the top of my  
10:31:09 25 head point Your Honor to a specific page in the privilege

10:31:12 1 log, but where there are communications withheld for that  
10:31:15 2 reason, I understand that we've produced a privilege log to  
10:31:20 3 Samsung specifically identifying, you know, those  
10:31:22 4 communications and describing them as communications  
10:31:24 5 relating to the enforcement and the validity of the patents  
10:31:28 6 being discussed.

10:31:29 7 I understand that we also have attached, I guess,  
10:31:34 8 a privilege log in response to their motion, I think,  
10:31:38 9 showing that that's what we did.

10:31:39 10 THE COURT: All right. Tell -- if you're going to  
10:31:42 11 contend that communications between Headwater and  
10:31:48 12 InterDigital in the process of these negotiations are  
10:31:54 13 subject to the attorney-client privilege, you'll need to  
10:31:57 14 give me the authority for that.

10:31:58 15 If what you're dealing with is whether or not a  
10:32:04 16 document that was already a communication between  
10:32:13 17 Headwater's attorneys and Headwater, whether the sharing of  
10:32:17 18 that with InterDigital waived that privilege, I see that as  
10:32:22 19 a different issue.

10:32:23 20 MR. TSUEI: Okay, Your Honor.

10:32:27 21 So I'd say the authority is the authority that was  
10:32:30 22 cited to the Court in our briefing.

10:32:32 23 THE COURT: All right. Tell me where I'll find  
10:32:34 24 that.

10:32:34 25 MR. TSUEI: So I'd say that the most persuasive

10:32:40 1 authority is the Federal Circuit's opinion in  
10:32:42 2 In re Regents, which although dealing with, I believe,  
10:32:44 3 Seventh Circuit law on the common interest doctrine, I  
10:32:47 4 think, is analysis that we'd say is persuasive for the  
10:32:51 5 Court to resolve the issue here today.

10:32:52 6 So let me just find a specific page where we've  
10:32:56 7 discussed that case just so that we're all on the same  
10:32:59 8 page.

10:32:59 9 THE COURT: And is that in Docket No. 120? I see  
10:33:05 10 that that brief discusses the In re Regents decision.

10:33:15 11 MR. TSUEI: Yes, that's correct, Your Honor.

10:33:16 12 So on Page 14 of our opposition brief, among other  
10:33:20 13 places, we've talked about the In re Regents decision.

10:33:24 14 So my understanding of the facts there is that the  
10:33:26 15 Federal Circuit found that there was a sufficiently sort of  
10:33:32 16 congruent community of interest between a patentee and a  
10:33:35 17 prospective licensee discussing the enforceability of the  
10:33:38 18 patents in the context of determining whether or not to, in  
10:33:41 19 fact, do a deal between the two parties.

10:33:42 20 I would say that's directly on point, Your Honor.  
10:33:47 21 Like in that situation, both parties were -- you know, as  
10:33:51 22 Samsung says, arguably adverse to one another, right,  
10:33:55 23 because they're looking at a set of assets to determine  
10:33:58 24 whether or not a deal can be done. That's true in a sense,  
10:34:00 25 but at the same time, there are also legal interests which

10:34:03 1 are identical that both parties share, which is to ensure  
10:34:05 2 that the patents are, in fact, valid and later enforceable.

10:34:08 3 Now, the fact that the parties may have adverse  
10:34:11 4 economic interests, I think, doesn't derogate the fact  
10:34:15 5 that they have a sufficiently congruent legal interest.  
10:34:19 6 And, you know, I think the Federal Circuit agreed in  
10:34:22 7 In re Regents, and I think that logic should be applied  
10:34:26 8 here.

10:34:27 9 THE COURT: Your brief is talking about the  
10:34:32 10 interaction between ItsOn and Headwater?

10:34:33 11 MR. TSUEI: That's the section in which the  
10:34:35 12 discussion of In re Regents appears, because the  
10:34:39 13 In re Regents case is topical and relevant to that separate  
10:34:43 14 issue between ItsOn and Headwater. But it's also relevant  
10:34:47 15 to whether or not there's a common interest between  
10:34:49 16 InterDigital and Headwater as well.

10:34:52 17 THE COURT: All right.

10:34:52 18 MR. TSUEI: And my colleague, Mr. Bunt, just  
10:34:55 19 helpfully reminded me that there's also a discussion of  
10:35:00 20 In re Regents on Page 11, which is not exclusive to the  
10:35:03 21 ItsOn/Headwater common interest issue.

10:35:07 22 THE COURT: All right. I see that as well.

10:35:23 23 Well, that is an issue I'll have to look at those  
10:35:26 24 authorities further to decide.

10:35:28 25 Do you agree that that issue underlies several of

10:35:35 1 these motions?

10:35:36 2 MR. TSUEI: I would say it underlies but does not  
10:35:40 3 dictate the outcome of the different requests for relief  
10:35:43 4 across the different motions, each of which has anything  
10:35:47 5 ranging from slightly different requests for relief to what  
10:35:50 6 we'd consider to be completely new requests for relief.

10:35:53 7 But we do agree that a resolution of the common  
10:35:56 8 interest issue between Headwater and InterDigital is  
10:35:59 9 relevant to the disposition of all those questions.

10:36:01 10 THE COURT: All right. Then that was the motion  
10:36:06 11 to compel at Docket 88, also the motion at Docket 100, I  
10:36:22 12 believe?

10:36:22 13 MR. TSUEI: Yes, sir. And the last docket number  
10:36:25 14 Mr. Graubart mentioned was Docket 137.

10:36:36 15 THE COURT: What other -- what other interests --  
10:36:37 16 I mean, what other issues do you believe the Court has to  
10:36:40 17 consider in connection with those motions besides this  
10:36:45 18 common interest?

10:36:46 19 MR. TSUEI: Well, Your Honor, the next sort of  
10:36:49 20 discrete issue, which is one that I think requires an  
10:36:55 21 analytically distinct approach, is the request for relief  
10:36:57 22 in Docket 137, which is outlined in IX.B of the joint  
10:37:04 23 status report.

10:37:05 24 This issue is one where Samsung's alleged that  
10:37:16 25 Headwater has waived as a subject matter -- on a subject

10:37:21 1 matter basis all privilege relating to -- I don't want to  
10:37:27 2 misquote them, but they say it's --

10:37:30 3 THE COURT: So this is -- you're moving to a new  
10:37:33 4 issue?

10:37:33 5 MR. TSUEI: Yes, sir.

10:37:34 6 THE COURT: Okay. Well, let's go ahead and take  
10:37:38 7 the morning recess then so that I don't further abuse the  
10:37:43 8 court reporter. And we'll come back and move to that new  
10:37:45 9 issue.

10:37:46 10 COURT SECURITY OFFICER: All rise.

10:37:51 11 THE COURT: 15 minutes.

10:37:52 12 (Recess.)

10:51:53 13 COURT SECURITY OFFICER: All rise.

10:51:59 14 THE COURT: Thank you. Please be seated.

10:52:01 15 All right. Mr. Tsuei, I think I interrupted you  
10:52:04 16 when you were moving on to the next -- or what -- and, I  
10:52:12 17 guess, frankly, before you move on to the next topic, let  
10:52:15 18 me ask Mr. Graubart whether you have anything else that we  
10:52:20 19 need to hear about on the motions that deal with this  
10:52:26 20 common interest? I'm going to look at the authorities that  
10:52:31 21 both sides have offered on that in the briefing and issue  
10:52:37 22 something on that.

10:52:38 23 Is there something else you think I need to look  
10:52:41 24 at on those motions, Mr. Graubart?

10:52:43 25 MR. GRAUBART: So with respect to Docket 88 and

10:52:45 1 the aspects of Docket 100 pertaining to InterDigital, I  
10:52:50 2 think two points. One is to say that factually I think  
10:52:53 3 you'll find that the In re Regents case is very distinct  
10:52:57 4 here.

10:52:57 5 That was a -- it was the University of California  
10:52:58 6 at Berkeley and Eli Lilly forging an exclusive licensee  
10:53:04 7 relationship and having communications about the  
10:53:06 8 prosecution of the patents in furtherance of that. It was  
10:53:08 9 not a negotiation of a purchase and sale in an adverse  
10:53:11 10 context.

10:53:12 11 And the cases from this district that have held  
10:53:15 12 the opposite are -- you know, post-date In re Regents, and  
10:53:19 13 that's -- and I think the reason that they reach a  
10:53:22 14 different conclusion is because these facts are very  
10:53:24 15 different.

10:53:25 16 There's also a Federal Circuit decision from 2011  
10:53:27 17 in In re IPCom, and that's 428 F.Appx. 984 at Page 986.  
10:53:37 18 And there the Court denied mandamus relief after a District  
10:53:42 19 Court had ordered produced documents like these that were  
10:53:45 20 exchanged in the context of the purchase and sale of the  
10:53:48 21 patents. So if In re Regents somehow governed in this  
10:53:52 22 context that that -- IPCom would have come out a different  
10:53:54 23 way.

10:53:54 24 I think that's all I have on those two issues,  
10:53:58 25 Your Honor.



10:53:58 1 THE COURT: All right. Thank you.

10:54:00 2 MR. GRAUBART: Thank you.

10:54:01 3 MR. TSUEI: Your Honor, before turning to the next  
10:54:15 4 issue implicated by Docket No. 137, just one quick note in  
10:54:21 5 response to Mr. Graubart about In re Regents.

10:54:26 6 You're right that one point that the Federal  
10:54:29 7 Circuit, let's say, noted as one of the reasons why it  
10:54:30 8 found that there would be a common interest in those facts  
10:54:33 9 was the fact that the relationship being contemplated by  
10:54:37 10 the parties there, Eli Lilly and UC Berkeley, was going to  
10:54:43 11 be one of an exclusive licensee and a patentee.

10:54:46 12 Now, I'm not aware of any law saying that the -- I  
10:54:51 13 guess the relationship between one party or another must be  
10:54:54 14 one of a patentee and an exclusive licensee in order for  
10:54:57 15 the common interest exception to -- waiver to apply.

10:55:01 16 And as Your Honor looks through the cases cited to  
10:55:05 17 the Court in the parties' respective briefing, I think  
10:55:09 18 you'll find that courts, for instance, in the District of  
10:55:12 19 Ohio, as well as elsewhere, have found that the exclusive  
10:55:15 20 or non-exclusive nature of the license between one party  
10:55:18 21 and the other does not dictate the outcome of whether or  
10:55:21 22 not there would be a common interest but is instead just  
10:55:24 23 one fact that the Court has to apply in the factual  
10:55:27 24 analysis to determine whether or not the legal interests  
10:55:29 25 are sufficiently congruent.

1           So with that, I'll turn to the next issue which is  
2 the one involving whether or not Headwater has waived the  
3 subject matter of the -- I think what Samsung has described  
4 as the internal valuation Headwater performed regarding the  
5 InterDigital deal and the bases for, I guess, relief and  
6 equity among other things.

7           So I'll start just by saying quite generally that  
8 for Samsung to argue that there's a subject matter waiver  
9 about this topic is, in our view, completely unjustified  
10 given that there is no disclosure whatsoever within this  
11 privileged information that they've been able to identify  
12 that they could characterize as an intentional, knowing,  
13 and strategic disclosure of privileged communications  
14 information.

15           Now, I'm sure Your Honor is familiar now with the  
16 testimony in question, a portion of which was shown to the  
17 Court in the slides. The portion in question is  
18 Dr. Raleigh talking about what he and Headwater believed  
19 the deal was worth.

20           Now, Dr. Raleigh, to be fair, said that he  
21 believed it was worth far more than the paper value  
22 reflected on the agreement, the letter of intent, 60  
23 million. And not totally unprompted but specifically in  
24 response to exactly this line of questioning from Samsung's  
25 counsel said that one of the bases for his belief was that

10:56:59 1 at that time, I think it should not be unexpected that  
10:57:05 2 attorneys for the parties looked at the value of the deal  
10:57:09 3 by examining the assets. And one of the things that  
10:57:11 4 lawyers typically do in a deal like this is to determine  
10:57:15 5 whether or not the patents can generate, you know, a good  
10:57:18 6 ROI in the future.

10:57:19 7 Now, that's all true. You know, the testimony  
10:57:23 8 speaks for itself. But Dr. Raleigh didn't disclose the  
10:57:26 9 analyses, neither did he rely on them or put them at issue  
10:57:30 10 in any way. It was simply a response to Samsung counsel's  
10:57:34 11 questions about why he thought the deal was worth more than  
10:57:37 12 \$60 million.

10:57:37 13 THE COURT: Well, didn't he say that he thought it  
10:57:40 14 was worth hundreds of millions more?

10:57:45 15 MR. TSUEI: Yes, that's right.

10:57:46 16 THE COURT: And he said that he thought that  
10:57:49 17 because of what his lawyers told him?

10:57:52 18 MR. TSUEI: Well, no, he -- he said part of the  
10:57:55 19 analysis that supported his belief and the company's belief  
10:57:59 20 in the true value of the deal included the analysis that  
10:58:03 21 every company's lawyers will do when doing diligence in a  
10:58:07 22 deal like this.

10:58:08 23 THE COURT: What does it matter whether everybody  
10:58:10 24 does it? The only question here is did he reveal and rely  
10:58:15 25 upon information provided to him by his lawyers?

10:58:20 1 MR. TSUEI: As far as I know, no, because he  
10:58:23 2 didn't talk about, you know, what some lawyer told him  
10:58:25 3 about the value of the portfolio. Neither did he reveal  
10:58:28 4 any of the analyses that he was referencing when he gave  
10:58:31 5 that testimony.

10:58:31 6 Now, I would, you know, invite Your Honor to  
10:58:35 7 consider the converse question that I think illustrates the  
10:58:39 8 lack of actual disclosure of a privileged communication,  
10:58:42 9 which is they could have asked Dr. Raleigh: Why did you  
10:58:46 10 sue us in 2022?

10:58:48 11 Dr. Raleigh could have said, I think quite  
10:58:50 12 rightly: We consulted with our attorneys and arrived at a  
10:58:53 13 decision that, you know, we believe Samsung infringed the  
10:58:56 14 patents, and that's why we filed the suit.

10:58:57 15 Along the same lines, you know, a witness,  
10:59:00 16 including a corporate witness like Dr. Raleigh, is entitled  
10:59:04 17 to disclose non-privileged facts like those.

10:59:06 18 Now, if he were to say, my attorneys at  
10:59:09 19 Fish & Richardson, for instance, told me that this or that  
10:59:13 20 element were met and that we should file suit against  
10:59:15 21 Samsung, that'd be a different story because that would be,  
10:59:19 22 in fact, a disclosure of a communication.

10:59:21 23 Here on this record there is no evidence of any  
10:59:23 24 such disclosure of a communication, and that's why we think  
10:59:25 25 that, you know, at a minimum, there can't be a finding that

10:59:28 1 there was a subject matter waiver.

10:59:32 2 And, you know, along the same lines --

10:59:35 3 THE COURT: I'm not sure you're understanding this  
10:59:39 4 testimony the same way I do.

10:59:42 5 And show me the -- the back and forth that led to  
10:59:48 6 the part that was up on the screen a little earlier where  
10:59:54 7 Dr. Raleigh made reference to the basis for his belief that  
10:59:59 8 the value of the deal with InterDigital would have been  
11:00:04 9 hundreds of millions more than the \$60 million price.

11:00:08 10 MR. TSUEI: So I think the relevant portion of the  
11:00:11 11 testimony about that statement of belief about the deal  
11:00:16 12 being worth hundreds of millions of dollars is excerpted on  
11:00:22 13 Page 3 to 4 of Docket No. 137.

11:00:25 14 And, you know, giving Your Honor a chance to turn  
11:00:30 15 to that testimony, I understand that it's also been  
11:00:33 16 attached to Samsung's motion as Exhibit E. And directing  
11:00:40 17 your Court's attention exclusively to this section about  
11:00:44 18 the hundreds of millions of dollars assertion, you'll see  
11:00:47 19 that there is no disclosure of an attorney-client  
11:00:50 20 privileged communication. There's no reference to any  
11:00:52 21 attorneys at all.

11:01:23 22 THE COURT: All right. The expert, Mr. Kennedy,  
11:01:28 23 is relying upon testimony by Dr. Raleigh about the  
11:01:34 24 downstream value of the stock options. And that testimony  
11:01:43 25 you're suggesting does not reveal that the basis was

11:01:53 1 communications from counsel?

11:01:54 2 MR. TSUEI: Well, a brief correction, Your Honor.

11:01:57 3 I don't believe Mr. Kennedy is, in fact, relying  
11:01:59 4 on Dr. Raleigh's testimony here about, you know,  
11:02:03 5 Headwater's belief that the value of the deal was worth  
11:02:06 6 hundreds of millions of dollars.

11:02:07 7 As I understand the damages opinions in this case  
11:02:12 8 to have been presented, what Dr. Kennedy is actually saying  
11:02:15 9 is that \$60 million is the true value, and that should be a  
11:02:19 10 cap on all damages in the case.

11:02:20 11 I believe Samsung's position, and Mr. Graubart can  
11:02:25 12 correct me if I'm wrong, is that Mr. -- sorry,  
11:02:28 13 Dr. Raleigh's assertion of his and the company's belief in  
11:02:34 14 the value is irrelevant to the damages issues in this case.

11:02:37 15 And as long as we're discussing the damages  
11:02:40 16 issues, which, you know, we agree are implicated by this  
11:02:43 17 discussion, Headwater believes that the InterDigital deal  
11:02:45 18 is not relevant at all to the damages issues, which is why  
11:02:49 19 at most we simply responded to Dr. Kennedy's opinions and  
11:02:53 20 also noted without actually relying on Dr. Raleigh's  
11:02:57 21 testimony that discusses what the company thought the deal  
11:03:01 22 was worth.

11:03:02 23 We'd be fine if no party in the case discussed the  
11:03:07 24 InterDigital deal at all. So, unfortunately, we're left  
11:03:10 25 with this set of circumstances where Samsung wants to rely

1 on this letter of intent that is relating to an  
2 unconsummated patent purchase and equity exchange, and then  
3 wanting privileged communications from Headwater about what  
4 Headwater thought the deal was worth, when in reality, if  
5 it were up to Headwater, we'd say that none of this is  
6 relevant at all.

7 THE COURT: You know, I am sympathetic with your  
8 position that this should not be relevant because I believe  
9 that there's marginal relevance to sales of the company to  
10 the question of what's a reasonable royalty for  
11 infringement of a patent.

12 But I think that ship has sailed. There -- the  
13 Federal Circuit has indicated in numerous cases that this  
14 kind of evidence has some relevance to the damages  
15 analysis. And that's especially true when it consists of  
16 an offer from the patent owner to sell as opposed to just  
17 negotiations with someone else, some third party.

18 So I think that that is relevant.

19 And then it's my understanding from just what I've  
20 seen that Dr. Raleigh's response to that was to say: Well,  
21 the 60 million wasn't even the real value that the  
22 InterDigital deal involved. It also involved this greater  
23 amount, and that in dealing with that greater amount, he  
24 indicated that his knowledge of that came from counsel.

25 So tell me what I'm missing there.

11:05:24 1 MR. TSUEI: Yes, Your Honor.

11:05:26 2 So a quick correction. I'm not sure the letter of  
11:05:30 3 intent in question here that served as the bedrock for the  
11:05:34 4 negotiations between Headwater and InterDigital can be  
11:05:38 5 fairly characterized as an offer from the patentee to a  
11:05:41 6 prospective purchaser. What actually is -- the document  
11:05:44 7 is, it's a letter of intent provided by the prospective  
11:05:47 8 purchaser to the patentee, which the patentee signed in  
11:05:51 9 order to start the diligence period.

11:05:53 10 And so to the extent that Your Honor continues to  
11:05:55 11 believe that the -- you know, the fact that, you know, the  
11:05:59 12 InterDigital deal may have involved an offer by the  
11:06:04 13 patentee, we'd respectfully note that that's likely an  
11:06:04 14 inaccurate understanding of the evidence.

11:06:06 15 So instead, what's actually happening here is  
11:06:09 16 there was an offer from the prospective purchaser which the  
11:06:11 17 patentee tentatively agreed to, just to do the due  
11:06:15 18 diligence in the negotiations that are at issue here.

11:06:19 19 THE COURT: But the patentee was agreeing to a  
11:06:24 20 sale for \$60 million subject to whatever the internal  
11:06:31 21 requirements of that letter were?

11:06:33 22 MR. TSUEI: I believe that's right, Your Honor.  
11:06:36 23 Among other things, there was an expectation that there be  
11:06:40 24 a transfer of equity from InterDigital to Headwater. And  
11:06:42 25 so, you know, in that respect, at least, that's a



11:06:45 1 distinguishing fact that makes this agreement different  
11:06:49 2 from, as I understand, most of the other cases that have,  
11:06:52 3 in fact, been cited to the Court where, you know, the facts  
11:06:54 4 of those cases involved, you know, where they were, a  
11:06:56 5 straight patent purchase.

11:07:01 6 THE COURT: Well, Dr. Raleigh did testify that he  
11:07:09 7 had a belief that the actual value of this sale would have  
11:07:15 8 been in the hundreds of millions?

11:07:17 9 MR. TSUEI: Yes, that's what he testified to, as  
11:07:22 10 you can see on Page 4 at the top of Docket 137.

11:07:26 11 THE COURT: And are you saying that he never  
11:07:31 12 indicated that the source of his belief was counsel?

11:07:35 13 MR. TSUEI: Well, certainly not in that portion of  
11:07:38 14 the deposition, Your Honor.

11:07:39 15 So the alleged waiver, according to Samsung,  
11:07:43 16 occurs much later in the depo -- or I don't want to  
11:07:48 17 characterize it as much later but later in the deposition.  
11:07:50 18 And the testimony in question is also excerpted by Samsung  
11:07:53 19 on Page 5 of Docket 137.

11:08:00 20 THE COURT: All right.

11:08:00 21 MR. TSUEI: So my understanding is this testimony  
11:08:06 22 comes something like 35 pages after Dr. Raleigh's assertion  
11:08:10 23 about -- you know, his belief in what the deal was actually  
11:08:14 24 worth.

11:08:15 25 THE COURT: And I'm seeing on Page 5 that

11:08:19 1 Dr. Raleigh testified: And if I can just add, those were  
11:08:25 2 based on attorneys' analysis of what damage awards would  
11:08:30 3 look like.

11:08:31 4 MR. TSUEI: Yes, sir.

11:08:32 5 THE COURT: How is that not revealing in some  
11:08:41 6 manner the communication with counsel?

11:08:43 7 MR. TSUEI: Well, I'd say that it's a statement of  
11:08:47 8 belief from Dr. Raleigh giving context to why he believed a  
11:08:53 9 certain thing was true.

11:08:55 10 Now, as I said earlier, I think witnesses in  
11:08:58 11 depositions can say and attest to non-privileged facts that  
11:09:02 12 are relevant to their statements of belief. So Dr. Raleigh  
11:09:05 13 could have said, my attorneys thought Samsung infringed,  
11:09:08 14 that's why we filed a lawsuit.

11:09:09 15 Now, of course, that topic will have been the  
11:09:13 16 source and subject of discussion between counsel and the  
11:09:17 17 client, but that testimony by itself without more we don't  
11:09:20 18 believe is a disclosure of the communication itself.

11:09:28 19 THE COURT: I don't see how a client can be  
11:09:31 20 allowed to say a conclusion -- in this case, the hundreds  
11:09:38 21 of millions -- and cite counsel as the source for that  
11:09:47 22 conclusion and not be waiving some measure of the  
11:09:54 23 privilege.

11:09:54 24 MR. TSUEI: Understood, Your Honor. I think we'll  
11:09:57 25 have to respectfully disagree.

11:09:59 1 And then I'll address, Your Honor, if -- if you'll  
11:10:02 2 allow me, what the outcome should be if there was, in fact,  
11:10:05 3 some sort of waiver.

11:10:06 4 THE COURT: All right. Go ahead.

11:10:07 5 MR. TSUEI: So if Dr. Raleigh did, in fact, waive  
11:10:10 6 something with this testimony on Page 5, it's limited to  
11:10:13 7 what he said there.

11:10:15 8 Now, obviously, that's not what Samsung is asking  
11:10:18 9 for. They're asking for a complete subject matter waiver,  
11:10:21 10 and I just don't think that they've shown that.

11:10:23 11 Now, if your Court -- if Your Honor finds that  
11:10:26 12 this testimony constitutes a waiver but finds that there is  
11:10:29 13 no broader subject matter waiver, that's an outcome that is  
11:10:33 14 fine with us as well. And I think the subject matter  
11:10:38 15 waiver argument is really what's been presented to the  
11:10:41 16 Court.

11:10:42 17 THE COURT: The waiver that I would expect to  
11:10:46 18 find, and I'm -- and I say expect because I'll give the  
11:10:50 19 Defendant a chance to try and change my mind on it, but  
11:10:53 20 would be a waiver as to the attorneys' analysis of what  
11:11:01 21 damage awards would look like that Dr. Raleigh was  
11:11:04 22 referring to.

11:11:05 23 And if there is no such thing, then that would be  
11:11:10 24 a separate issue that the Defendant would be entitled to  
11:11:19 25 use. But if there is such an analysis, I think that --

11:11:27 1 it's hard for me to see how that does not waive it, because  
11:11:33 2 this is not just something that I think Dr. Raleigh was  
11:11:36 3 kind of trapped into. Dr. Raleigh wanted to explain why  
11:11:41 4 this deal was worth more than the face of it. So I think  
11:11:46 5 he was intending to -- to use it.

11:11:53 6 And in any event, that's what I think the waiver  
11:11:59 7 would be.

11:11:59 8 And I don't know, perhaps it would be helpful now  
11:12:02 9 to hear from Samsung and see if they're arguing for more  
11:12:05 10 than that and then give you a chance to respond.

11:12:09 11 MR. GRAUBART: Thank you, Your Honor.

11:12:13 12 I think what we would request is very similar to  
11:12:17 13 what was just discussed, that Dr. Raleigh put into issue  
11:12:24 14 and the expert will testify at trial presumably that the  
11:12:29 15 value to be received from InterDigital was not 60 million,  
11:12:32 16 it was this hundreds of millions, and that the basis of  
11:12:36 17 that hundreds of millions was advice of counsel.

11:12:39 18 And so I think we're entitled to everything about  
11:12:42 19 this alleged hundreds of millions of dollars valuation even  
11:12:48 20 if it is from the advice of counsel, including anticipated  
11:12:51 21 damages awards.

11:12:52 22 But if there's some other document from counsel  
11:12:54 23 that says it includes anticipated damage awards and it  
11:12:58 24 includes this other thing and it leads to a calculation of  
11:13:01 25 hundreds of millions, I think we're entitled to that, too,

11:13:04 1 because they are relying on it and putting it at issue.

11:13:08 2 THE COURT: Well, did Dr. Raleigh also talk  
11:13:09 3 separately about stock options, or is this the same thing?

11:13:20 4 MR. GRAUBART: It's the same thing, Judge.

11:13:22 5 So what happens is -- and if I can put this on the  
11:13:25 6 ELMO, I can give a little more context.

11:13:29 7 So this is the earlier -- the part that was  
11:13:35 8 attached to -- the part that was attached to the brief was  
11:13:48 9 from the rough transcript. This is the final transcript.  
11:13:52 10 And this is the earlier part of the testimony where  
11:13:55 11 Dr. Raleigh talks about the letter of intent and the  
11:13:55 12 purchase price.

11:13:56 13 And in this bottom section that's highlighted, he  
11:13:59 14 says: We had an interest in the enhanced value of  
11:14:03 15 InterDigital that would result from the prosecution of the  
11:14:06 16 patent portfolio.

11:14:06 17 And I'll move this to get to the other end of the  
11:14:08 18 page.

11:14:08 19 He said: That's larger than the acquisition  
11:14:12 20 price.

11:14:13 21 Question: What was the value you put on that?

11:14:16 22 And he said: We felt it was hundreds of millions  
11:14:18 23 of dollars.

11:14:19 24 So then a few minutes goes by of other  
11:14:21 25 questioning, and then on Page 351 of the final transcript,

11:14:24 1 counsel comes back to this and says: You mentioned earlier  
11:14:27 2 there were, I believe, internal discussions about the value  
11:14:30 3 of consideration that Headwater was going to receive from  
11:14:33 4 InterDigital.

11:14:34 5 I said something to that effect.

11:14:36 6 And those internal discussions valued the  
11:14:39 7 consideration in excess of \$60 million?

11:14:41 8 Yeah, I don't think 60 million in closing is  
11:14:45 9 correct. It would have been the total consideration that  
11:14:49 10 was contemplated.

11:14:50 11 And were there internal discussions about that  
11:14:52 12 total value that Headwater would have received from  
11:14:55 13 InterDigital; is that correct?

11:14:56 14 There were scenario analyses considered.  
11:14:58 15 Obviously, a portion of the payment, subject to future  
11:15:06 16 gains, and so we considered, like I said, the net present  
11:15:10 17 value risk adjusted based a variety of scenarios and wealth  
11:15:14 18 of those scenarios and so forth, as one would normally do  
11:15:17 19 in this kind of discussion.

11:15:18 20 And then there's a colloquy between counsel saying  
11:15:22 21 we want production of this material.

11:15:24 22 And that's when Mr. Raleigh volunteers and  
11:15:27 23 interjects: If I can add, those -- and when he saying  
11:15:31 24 those, it's those internal discussions that supposedly led  
11:15:32 25 to his hundreds of millions of dollar conclusion -- those

11:15:35 1 were based on attorneys' analyses of what damages awards  
11:15:42 2 would look like.

11:15:42 3 So he's putting at issue the content -- the sub --  
11:15:45 4 of the attorney advice about these -- that led to this  
11:15:49 5 internal analysis that under -- that supposedly led to his  
11:15:53 6 conclusion of hundreds of millions of dollars valuation.

11:15:59 7 And it's just manifestly unfair for Samsung to be  
11:16:03 8 faced at trial with this -- this assertion that there was a  
11:16:08 9 value of hundreds of millions of dollars and then be told  
11:16:11 10 that the basis for it we can't see because it was based on  
11:16:15 11 attorneys' analysis of damages awards that no one is  
11:16:18 12 allowed to see.

11:16:18 13 THE COURT: All right. Well, what I think the  
11:16:23 14 scope of the waiver would be is the attorneys' analysis of  
11:16:30 15 what damage awards would look like that is specifically  
11:16:34 16 referenced and any discussion of the downstream value of  
11:16:46 17 the stock options.

11:16:51 18 MR. GRAUBART: And, Your Honor, to the extent that  
11:16:52 19 Headwater reports that they're unable to locate any of  
11:16:55 20 that, can I suggest that Samsung would be entitled to a  
11:16:58 21 verified response to that effect stating Headwater does not  
11:17:01 22 have in its possession any such materials?

11:17:05 23 THE COURT: I think that's --

11:17:06 24 MR. GRAUBART: Or a continued deposition of  
11:17:09 25 Mr. Raleigh on it, either one or the other?

11:17:11 1 THE COURT: I think that's a fair request.

11:17:12 2 MR. GRAUBART: Thank you, Your Honor.

11:17:18 3 THE COURT: And, Mr. Tsuei, if you want to speak  
11:17:20 4 to that, I'm happy to hear it. I would like to get a time  
11:17:25 5 frame for the production of this or the production of a  
11:17:32 6 declaration that after looking for it, you've not been able  
11:17:36 7 to find it.

11:17:37 8 MR. TSUEI: Sure.

11:17:38 9 Optimistically, we could likely provide that  
11:17:43 10 within a week. And just to preview for the Court what  
11:17:47 11 we've already told Samsung on this issue, we haven't been  
11:17:49 12 able to find, I guess, valuation analyses conducted by  
11:17:54 13 attorneys relating to prospective damages awards in the  
11:17:58 14 future, but we're willing to testify to that in a sworn  
11:18:01 15 statement, or at least Dr. Raleigh, I assume, would be.

11:18:04 16 And to the extent that it sounds like your  
11:18:07 17 Court -- Your Honor, you know, would like a verified  
11:18:09 18 response, we can provide that as well.

11:18:11 19 THE COURT: All right. Then I'll note that that  
11:18:14 20 should be provided within a week. If you need more time,  
11:18:18 21 you can see whether you can confer and get that. If not,  
11:18:23 22 file a motion.

11:18:24 23 MR. TSUEI: Yes, Your Honor.

11:18:25 24 THE COURT: All right. What's next?

11:18:38 25 MR. GRAUBART: Your Honor, two -- two options for



11:18:43 1 you. One will be we can go back sequentially in time to  
11:18:46 2 Docket No. 96, I believe, or we could finish out the other  
11:18:49 3 aspects of Docket 100 that don't relate to InterDigital.

11:18:54 4 THE COURT: Why don't you go ahead and finish out  
11:18:57 5 the motion at Docket 100.

11:18:59 6 MR. GRAUBART: Okay. Thank you.

11:19:00 7 Ms. Andrews, could we turn the HDMI source back  
11:19:08 8 on, please? Thank you.

11:19:09 9 So, Your Honor, the other aspects of Docket No.  
11:19:12 10 100 pertain to other communications that Headwater had with  
11:19:18 11 third parties besides InterDigital, and these are ItsOn and  
11:19:23 12 Verizon, and that Headwater is withholding as privileged,  
11:19:28 13 including under the application of the common legal  
11:19:32 14 interest exception to waiver.

11:19:34 15 So a little bit of -- of history here. When we  
11:19:40 16 filed this motion, as the Court could see from I believe  
11:19:45 17 it's Exhibit K to Docket 100, the only basis for  
11:19:50 18 Headwater -- I'm focusing now on the ItsOn aspect. I'll  
11:19:53 19 put Verizon to the side for a moment.

11:19:55 20 The only basis that Headwater provided for  
11:19:57 21 withholding these communications with ItsOn was the fact  
11:20:00 22 that ItsOn had a licensor/licensee relationship with  
11:20:04 23 Headwater, and they cited three cases, including that  
11:20:07 24 In re Regents case. I think that In re Regents case is the  
11:20:11 25 only one that deals with actually applying the common

11:20:14 1 interest exception, and it dealt, as we talked about, with  
11:20:16 2 this exclusive licensee, which is not what Headwater and  
11:20:20 3 ItsOn's relationship was.

11:20:21 4 And so we didn't believe that supported it, and we  
11:20:25 5 filed the motion.

11:20:26 6 In response, and after the briefing, Headwater  
11:20:29 7 presented the declaration on March 14th of Dr. Raleigh  
11:20:33 8 painting a much fuller picture, one that hadn't been laid  
11:20:37 9 out previously in their interrogatory responses about  
11:20:41 10 Headwater's history but that newly paints this picture that  
11:20:44 11 if taken alone and taken in isolation, might support  
11:20:48 12 Headwater's position.

11:20:50 13 And that picture is saying that Headwater and  
11:20:53 14 ItsOn, that they were these two companies that Dr. Raleigh  
11:20:56 15 both founded -- he founded them both. They shared the same  
11:21:00 16 physical office space. They shared computer systems. They  
11:21:03 17 shared key employees and consultants. They shared boards  
11:21:06 18 of directors members. They shared the same in-house  
11:21:10 19 counsel, Krista Jacobsen and James Harris. He said they --  
11:21:13 20 when it came to the -- to using the different companies'  
11:21:16 21 email addresses, he said: Oh, Headwater and email --  
11:21:19 22 Headwater and ItsOn email domains were flexibly used by  
11:21:25 23 participants.

11:21:26 24 So as I say, standing alone, those broad claims of  
11:21:29 25 privilege, that might support it. But we can't take that

1 declaration standing alone. We need to look at the full  
2 evidentiary record here.

3 And when you do that, you see, Your Honor, that  
4 Headwater has been all over the map in this case about the  
5 relationship between Headwater and ItsOn. When it suits  
6 Headwater -- like for purposes of this motion, the two  
7 companies, you know, operated basically hand in glove,  
8 attached at the hip in this common pursuit. But when  
9 they -- when it suits them in another context, they sing a  
10 different tune.

11 So what do I mean by this? So this is Docket 136,  
12 the declaration from Dr. Raleigh on March 14th where he  
13 says, among other things: The composition of the board of  
14 both companies also largely overlapped.

15 But then on Monday evening, 36 hours ago, Your  
16 Honor, Headwater filed a brief in opposition to a motion  
17 that Samsung filed seeking sanctions for the spoliation of  
18 certain evidence that we say Headwater could have preserved  
19 from ItsOn.

20 And what did Headwater say in response? Oh,  
21 these -- these were two legally separate entities with no  
22 common ownership, different shareholders and board members.

23 So we now have an inconsistency about whether they  
24 had the same board.

25 What about Mr. Raleigh's contention that they had

11:22:42 1 the same in-house counsel, Mr. Harris and Ms. Jacobson? In  
11:22:47 2 his declaration, he said that Mr. Harris served as in-house  
11:22:51 3 counsel and also -- that they both served as in-house  
11:22:55 4 counsel, and they both performed legal services for ItsOn.

11:22:57 5 Well, what did Mr. Harris have to say about that?  
11:23:00 6 He said: I was not an employee of ItsOn. And other than  
11:23:03 7 discussing some patents with inventors, he never did any  
11:23:06 8 work for ItsOn. And he said the same thing is true for his  
11:23:09 9 predecessor Ms. Jacobson, that he doesn't believe she ever  
11:23:13 10 did any work for ItsOn.

11:23:14 11 Okay. Well, what about this discussion about  
11:23:16 12 emails? Oh, we were -- it was very flexibly used, he said  
11:23:16 13 in his declaration. But that's not what he said at his  
11:23:21 14 deposition before he knew that it -- that this was an  
11:23:23 15 issue.

11:23:23 16 He said: Oh, I tried -- I didn't do it at all. I  
11:23:26 17 never did Headwater business on ItsOn email. Then he  
11:23:29 18 qualified it and said: Well, I tried very hard. I did the  
11:23:31 19 best I could to -- to keep them separate.

11:23:34 20 And I understand that. That's a reasonable thing  
11:23:36 21 for a business executive to say, but it's not the same  
11:23:40 22 thing as what he came up with four months later when trying  
11:23:44 23 to establish a common interest privilege assertion.

11:23:49 24 And what about the notion of whether they were  
11:23:53 25 pursuing a common interest and when those interests may

11:23:56 1 have diverged?

11:23:57 2 So in his declaration, he says: Headwater and  
11:24:00 3 ItsOn shared the pursuit of innovating, patenting, and  
11:24:04 4 commercializing. At all relevant times, they had a  
11:24:07 5 licensor/licensee relationship until ItsOn wound up. And  
11:24:11 6 in his declaration, he says that wind-up took place in  
11:24:16 7 2018.

11:24:16 8 He said: The only time their interest diverged  
11:24:17 9 was a specific occasion when the license agreement had to  
11:24:19 10 be -- between the two parties had to be negotiated -- had  
11:24:22 11 to be renegotiated.

11:24:23 12 Okay. Well, on Monday, Headwater said something  
11:24:26 13 else. It said: Well, from 2017 until the dissolution,  
11:24:30 14 their interests completely diverged. They had different  
11:24:34 15 CEOs. They had adverse legal interests. And why was this  
11:24:38 16 adverse interest -- this is important -- it's because  
11:24:43 17 ItsOn's continuing failure to pay royalties owed to  
11:24:46 18 Headwater.

11:24:48 19 So while this brief says that it was from 2017, if  
11:24:48 20 we go back to Mr. Harris's testimony -- again, he was the  
11:24:50 21 acting CEO of Headwater, as well as the general counsel --  
11:24:54 22 he says that the time when there was no royalties being  
11:24:57 23 paid, that was back in 2015 to 2016.

11:25:01 24 So taking Headwater at its word that they did not  
11:25:04 25 have a common interest during the time when they were not

11:25:07 1 getting paid by -- from this royalty under this license  
11:25:10 2 agreement, that went back all the way to 2015.

11:25:13 3 And yet when we look at the privilege log, there  
11:25:18 4 are scores of emails from Mr. Raleigh on his ItsOn email  
11:25:22 5 address to third parties, some of whom may or may not be  
11:25:26 6 attorneys, that are from 2017.

11:25:30 7 So there's just no consistency to the story. You  
11:25:33 8 cannot take the March 14th declaration on its face as the,  
11:25:37 9 you know, Rosetta Stone to the relationship between  
11:25:40 10 Headwater and ItsOn.

11:25:41 11 So where does that leave us? The supposed common  
11:25:52 12 interest covers -- allegedly covers every single email  
11:25:56 13 regarding legal issues that involve both Headwater and  
11:25:59 14 ItsOn personnel for the entire duration through this  
11:26:03 15 2017 -- at least through 2017 is the dates we see on the  
11:26:06 16 privilege log.

11:26:06 17 And the burden is on Headwater to prove that for  
11:26:09 18 the -- for that entire time, they had a substantially  
11:26:12 19 identical interest, that that interest was legal, not just  
11:26:16 20 commercial, and that they have to establish -- they have to  
11:26:19 21 prove the time frame during which that existed. And this  
11:26:22 22 record just doesn't -- just doesn't establish that, Your  
11:26:25 23 Honor.

11:26:25 24 And so we ask the Court to -- to overrule the  
11:26:28 25 common interest privilege assertion with respect to

11:26:31 1 communications either between Headwater and ItsOn or  
11:26:34 2 between ItsOn and third parties and order Headwater to  
11:26:39 3 produce those communications.

11:26:41 4 THE COURT: How would there be communications  
11:26:51 5 produced here between ItsOn and third parties that don't  
11:26:54 6 involve Headwater?

11:26:54 7 MR. GRAUBART: Well, I think that goes back to the  
11:26:56 8 flexibly used email issue, Your Honor. That was our  
11:26:58 9 question, as well, and I believe the answer provided for  
11:27:01 10 Headwater is to say he just used whatever email he wanted.  
11:27:04 11 And so he's really conducting Headwater business here and  
11:27:09 12 doing Headwater -- engaging in Headwater privileged  
11:27:14 13 communications.

11:27:14 14 THE COURT: So all of those emails you're talking  
11:27:16 15 about would be involving Mr. -- or Dr. Raleigh?

11:27:22 16 MR. GRAUBART: I think most of them do, Your  
11:27:23 17 Honor. There are some, I believe, on their log that are  
11:27:27 18 between other individuals that -- either at Headwater or at  
11:27:32 19 ItsOn that are communicating with a -- with -- so either  
11:27:36 20 someone at Headwater communicating with someone at ItsOn  
11:27:39 21 that are being withheld as privileged, or someone at  
11:27:42 22 ItsOn's email address computing -- communicating outside of  
11:27:47 23 ItsOn and being withheld as privileged.

11:27:50 24 THE COURT: All right. Thank you, Mr. Graubart.

11:27:56 25 MR. GRAUBART: Thank you, Judge.

11:27:57 1 MR. TSUEI: Thank you. Good afternoon, Your  
11:28:16 2 Honor. James Tsuei again for Headwater.

11:28:17 3 So I suppose there are a number of issues I can  
11:28:20 4 begin by addressing, but if Your Honor won't mind, I'll  
11:28:23 5 start with the first principles, which is has Headwater met  
11:28:27 6 its burden to show that there is a privilege and should it  
11:28:30 7 not be found to be waived?

11:28:32 8 So the common interest exception to waiver here  
11:28:36 9 being asserted by Headwater specifically arises out of a  
11:28:40 10 licensee and licensor relationship that persisted from  
11:28:44 11 approximately 2009 to approximately 2017 or 2018.

11:28:47 12 Throughout this entire period, the legal interest  
11:28:52 13 between ItsOn and Headwater, in our view, did not  
11:28:56 14 substantially change.

11:28:57 15 Now, certainly there may be different economic  
11:29:00 16 interests between the two entities, but that's not really  
11:29:02 17 the question here that must be answered. The question is  
11:29:04 18 whether or not the legal interests persisted such that the  
11:29:08 19 common interest exception to waiver should apply.

11:29:10 20 And on that note, I'm not sure I heard a good  
11:29:13 21 argument from Mr. Graubart, which was to say they had  
11:29:15 22 different interests because there was a lack of royalty  
11:29:17 23 payments, for instance.

11:29:18 24 But, again, that's not what the case law requires.  
11:29:20 25 The case law requires an analysis of the legal interest



1 being asserted. And as far as I know, I don't think that  
2 Samsung has demonstrated that the legal interest did  
3 substantially change throughout the time period justifying  
4 a piercing of privilege here.

5 So turning to a couple of issues that Mr. Graubart  
6 indicated. Now, thematically, I'm sure your Court will  
7 note -- Your Honor will note that the -- the argument,  
8 generally speaking, from Samsung is that the assertions of  
9 privilege by Headwater have been inconsistent.

10 Now, we can address those one-by-one and explain  
11 to you why Mr. Graubart is incorrect or why the  
12 representations made by Samsung are misleading or otherwise  
13 untrue. So I'm happy to do that if Your Honor would like  
14 to do so. Although at the end of the day, I'm not sure it  
15 is relevant to whether or not there was a common interest  
16 exception that should be applied.

17 So starting with the issues that Mr. Graubart  
18 raised. First, he says that there is an inconsistency  
19 between what Headwater said about ItsOn in Dr. Raleigh's  
20 March 14 declaration vis-à-vis what Headwater said in its  
21 brief filed I think it was on Monday.

22 THE COURT: Maybe you can help me on that issue by  
23 telling me are you saying that the common interest doctrine  
24 in this case relies upon the licensor/licensee  
25 relationship, not on other aspects of the relationship

11:30:53 1 between ItsOn and Headwater?

11:30:54 2 MR. TSUEI: I would say the qualified answer is  
11:30:57 3 yes but not exclusively.

11:30:59 4 As Your Honor I'm sure is aware, most of the cases  
11:31:02 5 addressing factual situations involving licensees and  
11:31:05 6 licensors have involved essentially what have been  
11:31:07 7 described as bare licensee/licensor relationships. And in  
11:31:11 8 those circumstances, some courts have found that there's  
11:31:14 9 not a sufficiently congruent community of interest  
11:31:16 10 justifying the application of the non-waiver rule.

11:31:18 11 Other cases have found that where there is not a,  
11:31:24 12 quote, unquote, bare relationship between a licensee and a  
11:31:26 13 licensor, those facts would justify an application of a  
11:31:31 14 non-waiver rule.

11:31:32 15 And we'd submit to Your Honor respectfully that's  
11:31:35 16 exactly the set of facts we have here in this case. Here,  
11:31:38 17 we've got Headwater --

11:31:39 18 THE COURT: Which cases -- which cases would you  
11:31:42 19 say are the best cases in that group?

11:31:44 20 MR. TSUEI: So, first, I'll direct your Court --  
11:31:50 21 Your Honor's attention to the MPT case coming out of the  
11:31:54 22 Northern District of Ohio. That's been cited on Page 14 of  
11:31:58 23 Docket 120.

11:31:59 24 And if I'm recalling correctly, there was a  
11:32:09 25 similar line of argumentation addressed by the Federal

11:32:13 1 Circuit in the In re Regents case and found to have not  
11:32:19 2 justified piercing the privilege.

11:32:30 3 THE COURT: All right. The MPT versus Marathon  
11:32:34 4 Labels?

11:32:35 5 MR. TSUEI: Yes, Your Honor.

11:32:35 6 THE COURT: All right. Go ahead.

11:32:43 7 MR. TSUEI: So just starting from MPT in  
11:32:46 8 attempting to analogize those facts to this case, we'd say  
11:32:49 9 the facts are materially indistinguishable.

11:32:53 10 Here, there's a close relationship between  
11:32:54 11 Headwater and ItsOn. As Mr. Graubart helpfully pointed  
11:32:58 12 out, they were founded by the same person, shared a lot of  
11:33:00 13 the same staff, shared overlapping board members, although  
11:33:03 14 not all of the same board members. And throughout the life  
11:33:06 15 of the companies shared the same office space and often had  
11:33:10 16 access to the same computer systems.

11:33:12 17 And as a matter of fact, this isn't, you know,  
11:33:15 18 what I would describe as an ex post facto justification for  
11:33:19 19 protecting privilege. I would say that there's plenty of  
11:33:23 20 evidence here just from the evidence that's been presented  
11:33:25 21 in the briefs that the parties had much more than a bare  
11:33:29 22 relationship of that -- between a licensor and a  
11:33:33 23 non-exclusive licensee.

11:33:34 24 Here, we've got ItsOn personnel actively helping  
11:33:38 25 Headwater and speaking to Headwater's attorneys, assisting

11:33:41 1 Headwater's attorneys in prosecuting patent applications.  
11:33:45 2 That fact, as we've pointed out in our briefing, is just  
11:33:50 3 borne out by the privilege log where we've got folks with  
11:33:53 4 ItsOn email addresses directly communicating with  
11:33:55 5 Headwater's patent counsel.

11:33:56 6 And, in fact, this was the expectation of how the  
11:33:59 7 companies would operate, that Headwater would be the  
11:34:01 8 invention entity and the entity holding the IP and ItsOn  
11:34:06 9 personnel actually developing the technology and  
11:34:08 10 commercializing it.

11:34:08 11 And in the course of that very close relationship,  
11:34:11 12 protected by a licensee/licensor relationship, the ItsOn  
11:34:15 13 personnel worked directly for obtaining valid and  
11:34:21 14 enforceable patents that were ultimately -- were they  
11:34:23 15 issued assigned to Headwater.

11:34:25 16 In our view, that is a sufficiently congruent  
11:34:28 17 community of interest between the parties justifying the  
11:34:32 18 application of the common interest doctrine.

11:34:35 19 THE COURT: All right.

11:34:37 20 MR. TSUEI: So, you know, I -- I'm remiss to leave  
11:34:41 21 some of the -- what I would say, inaccurate descriptions of  
11:34:44 22 the record here left unrebutted, but I'll keep it short.

11:34:50 23 We never said that ItsOn and Headwater did not  
11:34:56 24 share common legal interest. Now, it's true that two  
11:34:59 25 entities can be separately owned, have different

1 shareholders, have no common ownership, have different  
2 board members, but overlapping board members, but still  
3 share a sufficiently congruent legal interest such that  
4 they should be considered to be a part of the same  
5 privileged community or community of privilege.

6 So, in fact, ultimately what I heard from  
7 Mr. Graubart was a rather reductive application of some  
8 arguments about how, well, if they didn't share all board  
9 members, then perhaps the privilege doesn't apply.

10 Respectfully, Your Honor, that's not really an  
11 analysis that the case law calls for, and the analysis that  
12 the case law calls for is what we've presented in our  
13 briefing and in the argument today.

14 Now, if Your Honor has any particular questions  
15 about the alleged, let's call it discrepancies in the  
16 record and representations here, some of which Mr. Graubart  
17 put on the screen for the Court, I'm happy to address them.

18 THE COURT: No. If more than just a bare  
19 licensor/licensee relationship is all that's needed, I  
20 think clearly -- despite all of the inconsistencies in the  
21 record, there is more than that bare arm's length  
22 licensor/licensee relationship here. But I'll just have to  
23 look at the cases that you have cited and see.

24 MR. TSUEI: Yes, Your Honor.

25 THE COURT: All right.

11:36:31 1 MR. GRAUBART: Your Honor, if I can make a couple  
11:36:33 2 quick points?

11:36:34 3 THE COURT: You certainly may.

11:36:35 4 MR. GRAUBART: Ms. Andrews, can we put the  
11:36:37 5 presentation back up? Thank you.

11:36:38 6 So most importantly, Your Honor, Mr. Tsuei just  
11:36:42 7 said that they're -- that they always had the same legal  
11:36:44 8 interest and there was never an adverse legal interest.

11:36:48 9 These are Headwater's own words to the Court 36  
11:36:51 10 hours ago. They had different CEOs and had adverse legal  
11:36:55 11 interests due to ItsOn's continuing failure to pay  
11:36:57 12 royalties to Headwater.

11:36:59 13 And the testimony is that that went back to 2015,  
11:37:05 14 and yet they're withholding things as late as 2017.

11:37:08 15 So that -- their -- by their own admission, there  
11:37:12 16 was not a common legal interest during that period. That's  
11:37:15 17 number one.

11:37:15 18 Number two, the MPT case from Ohio does say that  
11:37:20 19 more than a bare non-exclusive licensor/licensee  
11:37:24 20 relationship can support a common legal interest. That's  
11:37:27 21 the only case of which we're aware.

11:37:29 22 The only authority from the Federal Circuit that  
11:37:31 23 deals with this issue is In re Regents, which was the  
11:37:36 24 exclusive licensee relationship between UC Berkeley and  
11:37:39 25 Eli Lilly. So it's -- there is no controlling authority

11:37:43 1 on -- for this Court on this -- on this issue.

11:37:46 2 I respectfully disagree with the MPT court's  
11:37:50 3 decision because I don't see how they -- when they're, you  
11:37:55 4 know, working adversely to one another -- you know,  
11:37:58 5 Headwater was free to go license its patents to others.  
11:38:02 6 They allegedly didn't have this complete alignment with  
11:38:06 7 ItsOn.

11:38:07 8 In any event, I don't think the case law compels  
11:38:09 9 that.

11:38:10 10 THE COURT: All right.

11:38:10 11 MR. GRAUBART: And then thirdly, there's this  
11:38:12 12 question about the third parties, right?

11:38:14 13 As Your Honor asked, how is it that there's a  
11:38:17 14 common legal interest with respect to communications  
11:38:19 15 between ItsOn and a third party? And the only answer to  
11:38:22 16 that is like ignore the emails. It's really just Headwater  
11:38:26 17 communicating. And I don't think the testimony supports  
11:38:28 18 that.

11:38:31 19 THE COURT: All right. I'll look at that further.

11:38:34 20 MR. GRAUBART: Thank you, Your Honor.

11:38:35 21 THE COURT: And what about Verizon?

11:38:37 22 MR. GRAUBART: Oh, thank you, Judge. And this  
11:38:39 23 will be faster.

11:38:40 24 So it really boils down to this question. Was  
11:38:46 25 Verizon -- did Verizon have any board members on ItsOn --

11:38:49 1 on ItsOn's board?

11:38:50 2 Headwater says all the communications between  
11:38:53 3 either Headwater and a Verizon representative or ItsOn and  
11:38:57 4 a Verizon representative were -- are privileged because  
11:39:01 5 they were seeking or providing legal advice for both  
11:39:04 6 Headwater and for ItsOn.

11:39:06 7 But -- and it says Verizon was a board member of  
11:39:10 8 both Headwater and ItsOn.

11:39:12 9 After this, we twice wrote to Headwater saying:  
11:39:16 10 Can you please provide us any evidence that Verizon was on  
11:39:19 11 the board of ItsOn? We understand there's documentation  
11:39:22 12 saying they were on the board of Headwater. We never got  
11:39:25 13 any response.

11:39:26 14 And then Dr. Raleigh's deposition -- excuse me,  
11:39:30 15 declaration on March 14th, I think, kind of condemns this  
11:39:33 16 by silence. All it says is that Verizon was members of  
11:39:37 17 Headwater's board. There's no evidence in the record that  
11:39:39 18 Verizon was a -- had any representatives on ItsOn's board.  
11:39:43 19 And yet we have these communications between ItsOn and  
11:39:45 20 Verizon being withheld as allegedly privileged.

11:39:48 21 THE COURT: All right.

11:39:51 22 MR. GRAUBART: And that's it for Docket 100, Your  
11:39:53 23 Honor.

11:39:53 24 THE COURT: Thank you.

11:40:02 25 MR. TSUEI: Hello again, Your Honor. James Tsuei



11:40:04 1 for Headwater.

11:40:05 2 So if -- thankfully, I think this issue is fairly  
11:40:10 3 brief. The issue is whether or not there is sufficient  
11:40:11 4 evidence showing that Verizon was a board member of  
11:40:14 5 Headwater and ItsOn.

11:40:15 6 So despite Mr. Graubart's representations, we did,  
11:40:19 7 in fact, identify documents to Samsung, including  
11:40:22 8 specifically in our briefing for this motion showing, among  
11:40:25 9 other things, that Headwater granted board observer rights  
11:40:30 10 to Verizon in exchange for Verizon's investment in both  
11:40:34 11 Headwater and ItsOn.

11:40:35 12 Now, I'm not sure where that leaves us because it  
11:40:37 13 seems like perhaps the parties are not looking at the same  
11:40:40 14 evidence. But in -- the reality of honestly the  
11:40:44 15 communications is attorneys for Headwater and ItsOn were  
11:40:47 16 often the same people, for example, at the Wilson Sonsini  
11:40:52 17 firm, communicated with the board about company business,  
11:40:54 18 and specifically also involving oftentimes legal issues  
11:40:57 19 relating to the companies in emails to not only members of  
11:41:01 20 the board at (unintelligible) Horoson with (unintelligible)  
11:41:05 21 Horowitz's email address, but also to those same investors  
11:41:07 22 with their Verizon email addresses.

11:41:10 23 And as I understand it, at all times, the  
11:41:13 24 attorneys, you know, representing the companies understood  
11:41:15 25 that what they were saying when they were emailing the

11:41:17 1 board, including Verizon's representatives on the board,  
11:41:20 2 that those communications would be privileged.

11:41:23 3 Now, we're happy, of course, to -- in fact, just  
11:41:25 4 to show an example of such a communication to the Court if  
11:41:28 5 the Court deems it appropriate but, you know --

11:41:31 6 THE COURT: What is the evidence you're saying  
11:41:33 7 that you have produced now that shows that Verizon was  
11:41:41 8 either a board member or investor in ItsOn?

11:41:44 9 MR. TSUEI: So two examples are cited by Bates  
11:41:48 10 number in the -- if I recall correctly, the March 14  
11:41:53 11 declaration of Dr. Raleigh that was submitted to the Court.

11:41:58 12 THE COURT: And --

11:41:59 13 MR. TSUEI: It, among other things, I believe  
11:42:01 14 includes I think a document I think describing the  
11:42:05 15 corporate rules of Headwater, and it references, among  
11:42:08 16 other things, the existence of -- and the application and I  
11:42:13 17 guess the continuing effect of a board observer rights  
11:42:17 18 letter granting board observer rights and board membership  
11:42:21 19 to Verizon, and I believe that may have been also produced  
11:42:25 20 in the case.

11:42:25 21 THE COURT: And that declaration, I'm sure, has a  
11:42:31 22 CM/ECF number attached to it. Can you help me out with  
11:42:37 23 that?

11:42:38 24 MR. TSUEI: Yes, sir. That would be the ECF No.  
11:42:45 25 134.

11:42:46 1 THE COURT: 134-something, huh? In other words,  
11:42:54 2 it's an exhibit to 134?

11:42:55 3 MR. TSUEI: Yes, sir. It's specifically 134-1  
11:43:00 4 and -2 would be the evidence that we've cited or at least  
11:43:05 5 provided to Samsung with respect to this particular Verizon  
11:43:08 6 issue.

11:43:12 7 THE COURT: All right. I'll -- I will look at  
11:43:13 8 that in this connection.

11:43:14 9 MR. TSUEI: All right. As long as we're looking  
11:43:16 10 at the same document, the observer rights letter being  
11:43:20 11 referenced here in the colloquy on the record is, I think,  
11:43:23 12 referenced and discussed at Page 4 of Docket Number 134-2.

11:43:28 13 THE COURT: All right. Thank you, Mr. Tsuei.

11:43:37 14 MR. GRAUBART: Your Honor, I'm a little confused  
11:43:38 15 by the reference to 134 because the docket number here for  
11:43:43 16 Dr. Raleigh's declaration is Docket 136. And so I don't  
11:43:47 17 have 134 or any attachments with me.

11:43:49 18 But I think it was very apparent in Mr. Tsuei's  
11:43:54 19 choice of language to say that Headwater granted Verizon  
11:43:58 20 representatives observer rights to the board. You never  
11:44:01 21 heard him attest that -- that ItsOn had Verizon members on  
11:44:06 22 its board. If it does and if there's evidence of that,  
11:44:09 23 then I am satisfied. But I still haven't heard it, and I  
11:44:12 24 don't have these two documents in front of me, nor did I  
11:44:15 25 hear Mr. Tsuei represent that they, in fact, say that

11:44:18 1 ItsOn -- that ItsOn had Verizon representatives on its  
11:44:22 2 board. And if it did not, then I don't know what the basis  
11:44:25 3 is of privilege when you're just communicating with an  
11:44:29 4 investor. That doesn't -- isn't protected by  
11:44:32 5 attorney-client privilege.

11:44:33 6 THE COURT: All right.

11:44:34 7 MR. GRAUBART: Thank you.

11:44:34 8 THE COURT: I will look at the evidence on that.  
11:44:36 9 Thank you.

11:44:40 10 Are there other motions that either side needs to  
11:44:44 11 address?

11:44:46 12 MR. GRAUBART: There are a couple remaining  
11:44:50 13 motions, Your Honor, that my partner, Mr. Kodish, will  
11:44:52 14 address.

11:44:53 15 THE COURT: All right.

11:45:01 16 MR. KODISH: Good afternoon -- well, still  
11:45:03 17 morning, Your Honor. Thad Kodish for Samsung.

11:45:06 18 And just for your planning purposes in case the  
11:45:08 19 message hadn't been received, counsel and I had -- we had  
11:45:13 20 made progress and, in fact, resolved this morning Docket  
11:45:18 21 Nos. 99 and 113.

11:45:25 22 THE COURT: All right.

11:45:26 23 MR. KODISH: So what I'd like to discuss now is  
11:45:28 24 Docket 96. That's Samsung's motion that Headwater has  
11:45:34 25 employed an improper use of an ESI relevance screen.

1 Through negotiations, the -- the focus of the  
2 motion is really narrowed significantly from what  
3 Your Honor has from the briefing. We've really narrowed it  
4 down to two representations that Samsung has proposed about  
5 the documents Headwater is withholding as irrelevant. But  
6 if you give me -- allow me a brief summary of the motion's  
7 context, I think that will help assess that dispute.

8 Headwater is withholding certain documents as  
9 irrelevant, and we have reason to believe that it's a  
10 substantial number of documents and that they are actually  
11 relevant.

12 Samsung served its ESI terms on July -- in July of  
13 2023. Headwater objected to a single of those terms which  
14 Headwater later agreed to Samsung's narrowing of that term,  
15 which was provided on October 4th of 2023.

16 Headwater otherwise never advised of any issue  
17 about a large number of irrelevant hits causing problems  
18 with the review, and so we were led to believe there was no  
19 issues, and the documents would be coming in a reasonably,  
20 timely course.

21 But as time passed and the Headwater ESI  
22 production slowly rolled in, we became suspicious that  
23 Headwater was withholding relevant documents. As our  
24 motion describes, Headwater largely ignored our  
25 correspondence, requiring follow-up after follow-up. And

11:47:10 1 it wasn't until we started filing motions in January and  
11:47:13 2 February of this year that they started producing many key  
11:47:17 3 ESI documents that hit our July 28th, 2023 search terms.  
11:47:24 4 Like, for example, the documents about the InterDigital  
11:47:27 5 executive term sheet -- executed term sheet. That was not  
11:47:31 6 produced until we filed the Docket 88 motion that you have  
11:47:37 7 heard argument on today on January 26th of 2024. Documents  
11:47:43 8 about problems with ItsOn's software.

11:47:47 9 Now, you've heard a fair amount about ItsOn today.  
11:47:50 10 Mr. Tsuei talked about this close relationship, this  
11:47:55 11 symmetry between the two, one as the patent holder, one as  
11:47:59 12 the purported maker of technology to practice that IP.

11:48:04 13 But what has evolved in the course of discovery in  
11:48:08 14 this case is a lot of focus on the infirmities and  
11:48:15 15 technical failures of this ItsOn technology. And that has  
11:48:18 16 become important because of Headwater's plain thematic  
11:48:25 17 thrust of their entire case, which is that this is a  
11:48:29 18 copying case, that Samsung worked together with ItsOn for  
11:48:33 19 some amount of time, got some glimpse of the technology,  
11:48:38 20 and then proceeded to copy it, that they won't dispute  
11:48:43 21 that. They definitely are pushing that story every which  
11:48:46 22 way.

11:48:46 23 A counter narrative in this case is why on earth  
11:48:52 24 would somebody copy something that was a complete technical  
11:48:55 25 failure? Makes sense. And so a lot of discovery was

1 targeted at what we had learned from our side that -- that  
2 there were huge problems with the technology. So  
3 naturally, we began pressing Headwater for its evidence  
4 relating to problems with the ItsOn software.

5 It wasn't until we filed our February 5th, 2024  
6 motion -- this is dating back to discovery opening in  
7 spring of last year -- that the very next day, we got a  
8 22,000-page production from Headwater having all this  
9 information. We had already taken many depositions by this  
10 time, but -- but 22,000 documents flowed through.

11 Next, as a final example, talks about Headwater's  
12 patent portfolio sales negotiations, many of which we  
13 didn't receive until the night before Headwater's 30(b)(6)  
14 deposition on March 6th, 2024, just last month.

15 So to compromise and avoid this motion practice,  
16 we did ask Headwater for -- just to make certain  
17 confirmations that it wasn't holding back certain documents  
18 based on relevance. And we gave descriptions of those.  
19 But Headwater would not agree to -- to confirm that. And  
20 so we ultimately were forced to move to compel, citing  
21 these discovery concerns and making clear in our motion  
22 that we are okay with Headwater withholding wholly  
23 irrelevant material, like medical docs, marriage issues,  
24 and the like.

25 In its response, Headwater says that it has

11:50:36 1 produced all the relevant material, but ultimately, as a  
11:50:41 2 practical matter, this motion now has boiled down to  
11:50:44 3 Headwater confirming that it is not withholding what  
11:50:47 4 Samsung sees as relevant material narrowed to just a couple  
11:50:50 5 of descriptions.

11:50:53 6 And so I've already handed it to -- to counsel.  
11:50:57 7 It's just I have here a copy of a communication that just  
11:51:01 8 reflects exactly what we have distilled it down to, asking  
11:51:06 9 Headwater to represent they're not withholding these types  
11:51:09 10 of documents. I can provide you --

11:51:11 11 THE COURT: Please do.

11:51:12 12 MR. KODISH: Okay. May I approach?

11:51:13 13 THE COURT: Yes.

11:51:29 14 MR. KODISH: So this is -- what you're looking at  
11:51:33 15 here, Your Honor, is, you know, the latest email between us  
11:51:35 16 on this issue. This is -- this is my writing. Your  
11:51:39 17 responsive email below is appreciated. They had just  
11:51:43 18 agreed to Term No. 3 here that you see below. However,  
11:51:49 19 issues remain, I explained.

11:51:51 20 As a further compromise, Samsung is willing to  
11:51:54 21 narrow its request to the below three criteria, the third  
11:51:58 22 of which Headwater has now agreed to, per your below email.  
11:51:59 23 If Headwater refuses to agree to Criteria 1 and 2, please  
11:52:03 24 explain why that is so we can focus on either potential  
11:52:06 25 resolution or being able to explain the issue to the Court.



11:52:09 1 And we have not received a response to that, but  
11:52:13 2 I'll go ahead and just take the opportunity to tell you our  
11:52:17 3 position on why Categories 1 and 2 are relevant.

11:52:21 4 So -- and it helps the context. They've agreed to  
11:52:25 5 confirm they are not withholding as irrelevant emails about  
11:52:31 6 ItsOn and Headwater patents or problems with ItsOn's  
11:52:33 7 software. So that's good. That's along the lines of what  
11:52:35 8 I was talking about.

11:52:37 9 But for some reason, they are unwilling to agree  
11:52:41 10 to No. 1. Let's start with that. Headwater is not  
11:52:44 11 withholding any ESI that both hit on our term -- we're not  
11:52:48 12 asking for new search, we're just within the initial corpus  
11:52:52 13 that hit and should have hit, you know, middle of last  
11:52:55 14 year -- but that also includes any of the following terms,  
11:52:59 15 "patent" or "kernel" or "crash" or "remov\*" or "fail\*" or  
11:53:05 16 "probl\*" with the wildcard or "bug." Right?

11:53:07 17 There is -- has been a theme that's coming out  
11:53:13 18 from Headwater in this case that they take issue as to  
11:53:18 19 whether ItsOn technology actually caused problems in the  
11:53:22 20 phones in which it was installed. They often suggest the  
11:53:25 21 position that the problems experienced by the phones were  
11:53:28 22 caused not by ItsOn but were problems caused by something  
11:53:32 23 else or that those were not actual problems, they were mere  
11:53:37 24 routine issues that all products experienced.

11:53:40 25 On the current record of how hard Samsung has had

11:53:44 1 to fight to simply get the docs hit by its terms and that  
11:53:48 2 are indisputably relevant, we do not believe it is proper  
11:53:51 3 for Headwater to be making unilateral calls on this issue,  
11:53:54 4 and that's why we give them this additional -- these search  
11:53:58 5 terms.

11:53:58 6 From our perspective, all they need to do is run  
11:54:01 7 these seven terms against the existing corpus of hits and  
11:54:04 8 produce the docs they've withheld, if any, and confirm  
11:54:07 9 they've done it.

11:54:09 10 Moving quickly to No. 2, yeah, it probably just  
11:54:16 11 helps to read through it briefly. You know, so it's --  
11:54:21 12 confirms that ESI that was hit by Samsung's search terms,  
11:54:24 13 so same search, and that meet one of the following  
11:54:28 14 Conditions A or B.

11:54:30 15 A, that the ESI contains sensitive, personal, or  
11:54:34 16 secure financial information that has no relation to the  
11:54:37 17 case, which we're willing to take them on their word on  
11:54:40 18 that, and does not satisfy No. 1 above. So No. 1 above is  
11:54:46 19 what we think is -- half of the depositions have focused on  
11:54:50 20 No. 1 above.

11:54:51 21 And -- or, B, the ESI was hit by the ESI terms due  
11:54:57 22 solely to the phrase "Samsung" being present in the footer,  
11:55:00 23 and that's one of the points that they've made that there  
11:55:03 24 were ultimately hits where Sam -- you know, sent from a  
11:55:07 25 Samsung Galaxy phone was the reason for a hit. And so

11:55:10 1 we're hearing them on that and not the body of the email,  
11:55:13 2 and the email does not satisfy 1 above, again, harkening  
11:55:18 3 back to, you know, these kinds of documents that -- that we  
11:55:23 4 worry are being withheld and want confirmation that they  
11:55:28 5 aren't. So that is -- that is the argument here.

11:55:29 6 THE COURT: Mr. Kodish, why can't you describe the  
11:55:33 7 subject matters that you want to make sure are not being  
11:55:38 8 withheld as irrelevant as opposed to insisting on search  
11:55:47 9 terms?

11:55:47 10 MR. KODISH: I'm not certain I understood the  
11:55:55 11 question.

11:55:55 12 THE COURT: Well, I can tell you.

11:55:56 13 MR. KODISH: Sure.

11:55:57 14 THE COURT: I do not understand that the purpose  
11:55:59 15 of the protocol that we use for searching ESI is to prevent  
11:56:06 16 a relevance review by the producing party. And I don't  
11:56:14 17 know if -- if that is what underlies all of this.

11:56:20 18 Obviously, the intent of that ESI order is to try  
11:56:26 19 and make more manageable the production, and there are  
11:56:32 20 times when the producing party may choose not to review the  
11:56:38 21 documents for relevance, but I don't know anything that  
11:56:43 22 would prevent the party from doing that.

11:56:48 23 And I think that the way you've approached this in  
11:56:51 24 No. 3 makes sense and is something that the Court can  
11:56:57 25 supervise, in other words, a determination that a certain

11:57:02 1 category is relevant, and therefore, documents that fall  
11:57:07 2 within that category should not be withheld as irrelevant.

11:57:11 3 But --

11:57:15 4 MR. KODISH: Sure.

11:57:17 5 THE COURT: -- in the first two you are asking the  
11:57:19 6 Court to require that there be no relevance review of the  
11:57:22 7 production if it hits certain terms.

11:57:24 8 MR. KODISH: The converse on No. 1, for example,  
11:57:29 9 is simply the position that of the docs that were hit by  
11:57:35 10 our terms, if they were also hit by the word "kernel" or  
11:57:42 11 "crash" or these other terms, that they cannot be  
11:57:46 12 irrelevant, that -- that --

11:57:50 13 THE COURT: Then describe for me what the subject  
11:57:53 14 of those documents would be --

11:57:59 15 MR. KODISH: Yes.

11:58:02 16 THE COURT: -- that makes it necessarily relevant.

11:58:05 17 MR. KODISH: Sure. So the -- one of the main  
11:58:08 18 complaints about the ItsOn software is that it caused  
11:58:12 19 "kernel panic." So that's the -- the term of art. "Kernel  
11:58:17 20 panic" is a technical failure of the phones that cause them  
11:58:20 21 to blue screen and/or shut down.

11:58:23 22 And so --

11:58:26 23 THE COURT: Why isn't that covered by your  
11:58:29 24 Category 3(b)?

11:58:32 25 MR. KODISH: It isn't covered -- it isn't

11:58:35 1 necessary -- necessarily covered by Category 3(b) because  
11:58:39 2 of what has bubbled up in the position taken by both sides,  
11:58:43 3 which is that Headwater has repeatedly in its testimony  
11:58:48 4 tried to impart its message that, oh, a kernel panic that  
11:58:53 5 happened on this phone, that really wasn't caused by ItsOn  
11:58:57 6 technology. It was caused by something else. Or a bug  
11:59:00 7 that happened on that phone, though it may have been a  
11:59:04 8 function of ItsOn technology, it's completely mundane,  
11:59:09 9 routine, and unremarkable.

11:59:11 10 And so they -- they have, you know, messaged to us  
11:59:15 11 how they have a different view of what a problem is caused  
11:59:19 12 by ItsOn software. And we think that given the low bar of  
11:59:24 13 relevance, we're talking about a technology, it is the  
11:59:27 14 thrust of their -- of their case. The first 45 paragraphs  
11:59:31 15 of every complaint they filed against every Defendant is  
11:59:37 16 inextricably intertwined with championing this ItsOn  
11:59:41 17 technology that they say was so --

11:59:42 18 THE COURT: So why can't you either make that  
11:59:45 19 Category 3(c) or put an addition to 3(b) that says:  
11:59:51 20 Including kernels or crashes or --

11:59:54 21 MR. KODISH: We can absolutely -- so I certainly  
11:59:57 22 confess there's opportunity to improve the verbiage. We  
12:00:04 23 could absolutely make -- add one as to a Part C and add  
12:00:11 24 those subterms.

12:00:12 25 And, again, this is not a new search. This is

12:00:14 1 just documents within their existing corpus.

12:00:16 2 THE COURT: All -- all I would be doing -- I can  
12:00:19 3 rule on whether or not documents that hit on these search  
12:00:25 4 terms and are within a certain subject matter are relevant  
12:00:29 5 or not. And I don't mind making that determination, but  
12:00:34 6 I'm not going to say that they can't do a relevance  
12:00:40 7 evaluation if certain search terms are hit.

12:00:54 8 MR. KODISH: Well, so did I sufficiently explain  
12:00:57 9 the basis with the word "kernel," the word "crash," if  
12:00:59 10 that's where you're at, the word "fail"? It's all driven  
12:01:04 11 by that -- that major theme in this case about --

12:01:07 12 THE COURT: Well, what I'm -- would like to do is  
12:01:11 13 allow you to see if you can negotiate a subject matter that  
12:01:18 14 is agreeable to the other side and that covers the concerns  
12:01:23 15 that you have. And if this is the last thing, then we can  
12:01:29 16 just take a short break, give you a chance to do that, come  
12:01:32 17 back, and resolve this. If there is more, then we can just  
12:01:37 18 break for lunch.

12:01:40 19 Are there other motions that need to be addressed  
12:01:43 20 besides what we're dealing with now?

12:01:47 21 MR. KODISH: Yeah, there -- there are two -- two  
12:01:49 22 more, and they're -- well, yeah, they're kind of subparts  
12:01:51 23 of motions at this point.

12:01:53 24 THE COURT: Well, then we'll go ahead and take the  
12:01:57 25 lunch recess until 1:15 and ask you during that recess to

12:02:02 1 see if you can reach an agreement on that.

12:02:05 2 And even if you don't reach an agreement, I need  
12:02:08 3 you to describe it in a way that I can then hear argument  
12:02:12 4 on and rule up or down as to whether it's relevant.

12:02:15 5 MR. KODISH: Understood. Thank you, Your Honor.

12:02:16 6 THE COURT: Okay. All right. We'll be in recess  
12:02:20 7 until 1:15.

12:02:22 8 COURT SECURITY OFFICER: All rise.

12:02:22 9 (Recess.)

12:02:23 10 COURT SECURITY OFFICER: All rise.

01:13:27 11 THE COURT: Good afternoon. Please be seated.

01:17:13 12 Let me see, and I think -- was it -- Mr. Kodish,  
01:17:23 13 you're up.

01:17:24 14 MR. KODISH: Thank you, Your Honor. Again, Thad  
01:17:28 15 Kodish for Samsung.

01:17:29 16 And we're talking about the ESI motion, which is  
01:17:33 17 Docket 96. Per your request, we did have a discussion -- a  
01:17:41 18 meet and confer at the beginning of the break trying to  
01:17:45 19 hone in on what really seems to be a disconnect about the  
01:17:50 20 parties' perspective on the relevance review.

01:17:56 21 You know, just to reset, what happened in this  
01:18:00 22 discussion is essentially Mr. Tsuei representing they've  
01:18:02 23 produced all the problems about the phones -- you know, the  
01:18:09 24 phone's kernel, that's --- at least that's what we're  
01:18:11 25 taking them as having -- as having done, but yet they won't

01:18:18 1 represent that they produced all the docs that hit on our  
01:18:22 2 terms and that have the word "kernel," right, as our  
01:18:27 3 Category 1 request, you know, would -- would address.

01:18:32 4 And so we're trying to figure out, well, you know,  
01:18:36 5 why is that? And they -- they really lead with you are --  
01:18:43 6 you, Samsung, are asking us to run an entire new search, an  
01:18:50 7 entire new relevance review.

01:18:52 8 THE COURT: Mr. Kodish --

01:18:53 9 MR. KODISH: Yes.

01:18:54 10 THE COURT: -- I hate to interrupt you.

01:18:54 11 MR. KODISH: Sure.

01:18:56 12 THE COURT: But I asked you to do something fairly  
01:18:59 13 specific over the break, and that is to come up with a  
01:19:01 14 description of the category of documents that you want to  
01:19:04 15 make sure are not being withheld as irrelevant.

01:19:08 16 MR. KODISH: So we did that.

01:19:09 17 THE COURT: Okay.

01:19:10 18 MR. KODISH: We did that.

01:19:12 19 THE COURT: Tell me.

01:19:13 20 MR. KODISH: And, yeah, we used the lunch break  
01:19:14 21 after we talked to do that, and just we've been sitting  
01:19:18 22 here in the room, and we've provided just a few minutes  
01:19:21 23 ago -- I don't -- I doubt they've had a chance to fully  
01:19:23 24 digest it, but we've identified six requests.

01:19:29 25 You know, this is probably not really knowing what



01:19:31 1 it is that's being withheld as relevant --

01:19:34 2 THE COURT: Do you have those written down  
01:19:35 3 somewhere?

01:19:36 4 MR. KODISH: I have it in email form. I can read  
01:19:39 5 it into the record.

01:19:41 6 What would be best?

01:19:43 7 THE COURT: Why don't you email it to  
01:19:48 8 Mr. Scheufler here, and he can print it, and we'll have it.

01:20:01 9 MR. KODISH: Okay.

01:20:02 10 THE COURT: And I tell you what, while we're  
01:20:06 11 waiting for that, I will -- we'll take a break so we can  
01:20:11 12 print that out, and I would ask that if you haven't already  
01:20:15 13 done so, that you email it to Plaintiff's counsel as well.

01:20:18 14 MR. KODISH: We did.

01:20:19 15 THE COURT: Good. Then we can all be looking at  
01:20:22 16 it together, and I won't have to take it down.

01:20:26 17 All right. We'll take a short recess. Thank you.

01:20:28 18 COURT SECURITY OFFICER: All rise.

01:20:29 19 (Recess.)

01:20:30 20 COURT SECURITY OFFICER: All rise.

01:20:30 21 THE COURT: Thank you. Please be seated.

01:25:50 22 All right. Mr. Kodish, thank you. I have your  
01:25:54 23 six-part email in front of me.

01:25:56 24 MR. KODISH: Great. So would you like me just to  
01:25:58 25 address some context of each one, or how would you prefer

01:26:03 1 we proceed?

01:26:03 2 THE COURT: Let me hear first any objections to  
01:26:06 3 that, and then you can focus your arguments where there may  
01:26:10 4 be an objection.

01:26:12 5 MR. TSUEI: I'm not sure I would quite -- sorry,  
01:26:15 6 James Tsuei for Headwater.

01:26:16 7 I'm not sure I'd quite put this as an objection,  
01:26:20 8 but I'll note that the requests that Samsung counsel sent  
01:26:22 9 over and which we received recently don't appear to be  
01:26:26 10 tied, strictly speaking, to the motion that I think we've  
01:26:30 11 been discussing on the record, that is --

01:26:34 12 THE COURT: Well, why don't -- if you would go to  
01:26:36 13 the podium.

01:26:38 14 And what I really want to hear is if you object to  
01:26:41 15 any of these. If you don't, then I will just go with them.  
01:26:46 16 If you object to them, let me hear your objection.

01:26:50 17 MR. TSUEI: Okay. So, Your Honor, if I'm  
01:27:01 18 understanding the assignment correctly, we're to treat  
01:27:05 19 these six requests as, let's say, additional or new  
01:27:09 20 requests for documents, and then you want Headwater's  
01:27:11 21 position on whether or not production should be made?

01:27:13 22 THE COURT: No. The treatment of these six  
01:27:18 23 categories would be as additions to Paragraph 3 of the  
01:27:28 24 document we were dealing with as the resolution of this  
01:27:35 25 motion. And it's my understanding that what we're talking

01:27:38 1 about here is that the Plaintiff would confirm that it is  
01:27:42 2 not withholding as irrelevant any emails that hit on the  
01:27:51 3 search terms but are reviewed for relevance.

01:27:56 4 So this -- these would just be subsets of  
01:28:02 5 documents that hit on the search terms and just a  
01:28:07 6 representation that none of those that fall within these  
01:28:12 7 categories are being withheld from production on the basis  
01:28:17 8 of relevance.

01:28:18 9 MR. TSUEI: Thank you, Your Honor. I think  
01:28:21 10 that -- that clears up my -- my misunderstanding of the  
01:28:24 11 assignment.

01:28:24 12 So, yeah, happy to go through these six things and  
01:28:27 13 treat them as if they are potential -- I guess additional  
01:28:34 14 conditions on the agreement that is set forth in Subpoint 3  
01:28:37 15 of Samsung's email stipulating to conditions that they want  
01:28:42 16 us to make.

01:28:42 17 THE COURT: That's correct.

01:28:42 18 MR. TSUEI: Okay. So the first category is  
01:28:44 19 Documents Concerning the ItsOn's Technology Referenced in  
01:28:48 20 Headwater's Complaint.

01:28:50 21 I think I would object. I think we would object  
01:28:53 22 to that given the overbreadth of I guess what it means for  
01:28:56 23 documents to concern the ItsOn technology referenced in  
01:28:59 24 Headwater's complaint. But it may be a moot point because  
01:29:03 25 it's our understanding that we've already produced all

01:29:05 1 documents relating to ItsOn's technology that's discussed  
01:29:08 2 in the complaint.

01:29:10 3 So to get to the sort of \$64,000 question, is  
01:29:15 4 Headwater willing to agree to in writing that it's searched  
01:29:19 5 for documents fitting this category based on the hits from  
01:29:25 6 the search terms proposed by Samsung --

01:29:27 7 THE COURT: Well, it's a little different than  
01:29:29 8 that. It's that you're not withholding from production  
01:29:33 9 documents that hit on those terms and that fall within this  
01:29:38 10 category.

01:29:39 11 MR. TSUEI: Yes, Your Honor. I think we can do  
01:29:41 12 that. It's my understanding that we, in fact, have done  
01:29:43 13 that already throughout the life of the case.

01:29:47 14 THE COURT: All right. Take a look at the others  
01:29:52 15 and see if you feel the same way about them.

01:29:54 16 MR. TSUEI: Of course, Your Honor.

01:29:55 17 So going to No. 2 in Mr. Graubart's email,  
01:29:59 18 Documents Concerning ItsOn's Relationship With Samsung.

01:30:03 19 We can confidently say on the record that we have,  
01:30:06 20 to our understanding, produced all non-privileged documents  
01:30:08 21 and communications and emails that we've seen from the ESI  
01:30:11 22 searches relating to ItsOn's relationship with Samsung.

01:30:16 23 THE COURT: All right.

01:30:19 24 MR. TSUEI: Going to No. 3, Documents Concerning  
01:30:22 25 Valuations of Headwater Patents.

01:30:26 1 Without saying whether or not we object, I think  
01:30:28 2 one ambiguity that causes some pause on us to take a  
01:30:32 3 position on this is what it means for something to concern  
01:30:35 4 a valuation of Headwater's patents. And just with full  
01:30:39 5 candor, Your Honor, this is an issue that the parties have  
01:30:42 6 discussed in the past, that is, specifically what it means  
01:30:44 7 for a document to be a valuation of the patents.

01:30:48 8 THE COURT: I would interpret concerning in this  
01:30:50 9 context to mean discussing. In other words, not that  
01:30:55 10 there's some tangential argument that this could affect the  
01:31:00 11 valuation but that there are documents that discuss the  
01:31:06 12 valuation.

01:31:06 13 MR. TSUEI: Sure. Okay. So let's take that as a  
01:31:09 14 first step, documents discussing valuations of the patents  
01:31:12 15 or the patent portfolio or something similar to that  
01:31:15 16 effect.

01:31:15 17 I think the answer is yes. And we've put this in  
01:31:21 18 our briefing at least several times now. We have produced,  
01:31:24 19 as far as we can tell, all non-privileged documents  
01:31:27 20 concerning the valuations of Headwater's patents.

01:31:30 21 There is an additional wrinkle, Your Honor, caused  
01:31:33 22 by some of the events that have transpired today, namely  
01:31:38 23 your Court's finding -- Your Honor's finding that there's  
01:31:39 24 been a waiver as to the -- let's call it the Headwater  
01:31:44 25 valuation of the InterDigital deal. And that, of course,

01:31:48 1 can also encompass a value of the patent or some set of  
01:31:51 2 patents or the patent family writ large.

01:31:54 3           You know, as I said on the record, Your Honor,  
01:31:57 4 earlier today, you know, we understand what Dr. Raleigh  
01:31:59 5 said, but we looked for specifically and are not aware of  
01:32:03 6 any documents even fitting that description. If, you know,  
01:32:07 7 they want to ask Dr. Raleigh about it during trial and say,  
01:32:10 8 did you ever discuss this with attorneys, and they can  
01:32:14 9 probably learn the answer, which was there's nothing  
01:32:17 10 written, but it was a discussion with attorneys.

01:32:23 11           THE COURT: All right. So --

01:32:27 12           MR. TSUEI: With those caveats then, Your Honor, I  
01:32:29 13 think Headwater would be willing to agree to represent that  
01:32:32 14 they've produced all documents -- non-privileged documents  
01:32:36 15 concerning valuations of Headwater patents.

01:32:38 16           THE COURT: And the caveat is that you're going to  
01:32:40 17 look and see if there are any others in view of the ruling  
01:32:46 18 as to privilege?

01:32:47 19           MR. TSUEI: I think that's fair to say, Your  
01:32:50 20 Honor. We'll relook to see if there are any -- let's call  
01:32:54 21 them attorney analyses of the value of the portfolio with  
01:32:58 22 respect to the InterDigital deal, whether or not it relates  
01:33:01 23 to the equity, and we can find if any exist. And if they  
01:33:06 24 exist and fall under the waiver the Court -- Your Honor has  
01:33:08 25 found, then we'll produce them.

01:33:10 1 THE COURT: All right.

01:33:21 2 MR. TSUEI: So if there's nothing else on No. 3,  
01:33:23 3 we can turn to No. 4, which is documents concerning the  
01:33:27 4 accused features in Headwater's infringement contentions.

01:33:30 5 Sitting here today, I'm not aware that any  
01:33:40 6 documents have been withheld fitting this description on  
01:33:42 7 the basis of relevance or non-relevance. I'm not sure if  
01:33:46 8 there is a basis for Samsung to believe otherwise, and, you  
01:33:50 9 know, if they do, I'd invite them to explain why.

01:33:56 10 THE COURT: Well, the important thing for the  
01:34:00 11 present discussion is whether you can agree that you will  
01:34:05 12 not withhold such documents from production if they  
01:34:16 13 otherwise hit the terms in the ESI order.

01:34:24 14 MR. TSUEI: If there are non-privileged hits, Your  
01:34:27 15 Honor, yes, we can represent that. We would not withhold  
01:34:31 16 them as irrelevant. And, again, just to clarify, it's our  
01:34:34 17 belief that we have, in fact, produced all such documents  
01:34:37 18 in the case.

01:34:38 19 THE COURT: My understanding of the next one is  
01:35:05 20 that there is some settlement license with Sprint.

01:35:09 21 MR. TSUEI: Negative, Your Honor. That's not  
01:35:11 22 quite right.

01:35:12 23 So maybe a little bit of background would be  
01:35:16 24 helpful, just for the record.

01:35:17 25 Sprint was one of ItsOn's, I guess, biggest

01:35:21 1 accounts in terms of telco partners they were working with,  
01:35:25 2 with the ultimate goal to get ItsOn applications preloaded  
01:35:30 3 onto phones that were being retailed through Sprint, either  
01:35:34 4 through its website or the brick-and-mortar stores that  
01:35:39 5 they were, you know, operating at the time.

01:35:40 6 And as a part of this process, both ItsOn and  
01:35:44 7 Headwater were involved in trying to make sure that such  
01:35:47 8 Sprint's phones that did come preloaded with ItsOn's  
01:35:51 9 software were properly marked with, you know, this or that  
01:35:54 10 patent number or contained a link to a virtual marking  
01:35:58 11 page. And I believe that's what Samsung is looking for.  
01:36:00 12 And if so, then I'm happy to talk about that.

01:36:03 13 THE COURT: Well, I guess the question is, is --  
01:36:05 14 are such documents, documents that the Plaintiff believes  
01:36:14 15 would be irrelevant and, therefore, withheld from  
01:36:17 16 production on that ground?

01:36:18 17 MR. TSUEI: No, Your Honor. We don't believe that  
01:36:20 18 documents in this category would be not relevant to any  
01:36:23 19 claim or issue in the case. And that's why we've produced  
01:36:27 20 all of them already.

01:36:28 21 THE COURT: All right. So that one is not  
01:36:31 22 problematic.

01:36:31 23 What about the last one?

01:36:33 24 MR. TSUEI: The last one does require some  
01:36:35 25 unpacking, Your Honor. So, unfortunately, I respectfully



01:36:39 1 ask that the parties and your Court bear with me.

01:36:42 2 So Qualcomm is, as the Court knows, a very large  
01:36:47 3 technology firm. They've had discussions and dealings  
01:36:51 4 with, you know, the parties in this case, both Samsung,  
01:36:54 5 ItsOn, and Headwater throughout the past 10, 15 years.

01:36:57 6 Some communications between Headwater and Qualcomm  
01:37:02 7 have been produced in this case. Others have not. And I  
01:37:06 8 think I can divide that set of documents into two  
01:37:12 9 categories.

01:37:12 10 The first category will be quick, which is in  
01:37:16 11 2022, there was a very brief discussion between Headwater  
01:37:19 12 and Qualcomm concerning whether or not Qualcomm, you know,  
01:37:23 13 could buy the patents. And there was an offer letter sent  
01:37:27 14 from Qualcomm to Headwater. It was not accepted. But  
01:37:29 15 there were emails back and forth between, you know,  
01:37:32 16 Headwater and Qualcomm about this offer, all of which we've  
01:37:36 17 produced.

01:37:37 18 The second set of documents that, you know, quote,  
01:37:42 19 unquote, concern Qualcomm would be documents and  
01:37:46 20 communications between Headwater and Qualcomm in a much  
01:37:49 21 earlier time frame, in 2017 when Qualcomm and Headwater  
01:37:53 22 were in -- you know, if I can say, a deep discussion about  
01:37:57 23 the potentially setting up a partnership or joint venture  
01:38:01 24 or even an acquisition with some sort of backend relating  
01:38:05 25 to the enforcement of the patents going forward once the

01:38:08 1 deal had been done.

01:38:09 2           So as you might imagine, there were communications  
01:38:11 3 back and forth regarding claim charts, infringement reads,  
01:38:15 4 and so on. And those documents have been withheld in this  
01:38:18 5 case and have been properly logged as far as I understand.

01:38:21 6           THE COURT: They've been withheld as privileged or  
01:38:25 7 irrelevant?

01:38:26 8           MR. TSUEI: Withheld as privileged, and we've  
01:38:28 9 identified those documents in Headwater's privilege log.

01:38:35 10          THE COURT: All right. So it would be fair to  
01:38:37 11 say, then, that you're not withholding any of those  
01:38:42 12 documents as irrelevant?

01:38:44 13          MR. TSUEI: I think that's right, Your Honor. And  
01:38:47 14 if I could just add one more thing, it's come to my  
01:38:50 15 attention -- someone has quite helpfully reminded me we've  
01:38:55 16 produced also a number of communications between Qualcomm  
01:38:58 17 and Headwater from a much earlier time frame -- in the  
01:39:02 18 2009/2010 time frame. If I recall correctly, it was about  
01:39:09 19 a potential business deal between the companies. We've  
01:39:11 20 produced those as well.

01:39:12 21          But to answer Your Honor's ultimate question, if  
01:39:15 22 we're withholding anything as irrelevant, I believe the  
01:39:18 23 answer is no. And we can make that representation in  
01:39:20 24 writing.

01:39:23 25          THE COURT: All right. So then my takeaway from

01:39:29 1 this discussion, Mr. Tsuei, is that you do not object to  
01:39:36 2 including those Categories 1 through 6 in the -- to the  
01:39:45 3 3(a) and (b) that were agreed to previously?

01:39:47 4 MR. TSUEI: Certainly we are not saying that we're  
01:39:51 5 withholding documents in these categories as irrelevant. I  
01:39:55 6 think -- pursuant to our discussion, I think that's right.

01:39:58 7 THE COURT: Okay. Well, I think that should work,  
01:40:04 8 but I will give Mr. Kodish a chance to explain any issues  
01:40:09 9 he sees that remain.

01:40:10 10 MR. KODISH: No, that sounded -- that sounded like  
01:40:14 11 good progress.

01:40:14 12 The only thing that I heard at least once was  
01:40:17 13 sitting here today, he doesn't believe -- Headwater doesn't  
01:40:22 14 believe that it's withholding. So I would ask that we  
01:40:25 15 receive a written confirmation that no docs, in fact, of  
01:40:29 16 the withheld population waft into the -- these six request  
01:40:35 17 areas.

01:40:35 18 THE COURT: Well, I'm -- I'm going to put it in  
01:40:38 19 the order that in the resolution of this motion, Headwater  
01:40:44 20 confirmed that it was not withholding as irrelevant any of  
01:40:50 21 these eight categories, the 3(a) and (b), and then the six  
01:40:56 22 that we've just gone through.

01:40:59 23 MR. KODISH: Sure. It's a question that we've  
01:41:03 24 been asking for months, which is we would like to know how  
01:41:08 25 many docs are being withheld, so that would be an

01:41:12 1 additional ask of our hit document population.

01:41:17 2 THE COURT: And what would be the theory by which  
01:41:22 3 they'd have that obligation?

01:41:25 4 MR. KODISH: To be able to assess the degree of  
01:41:30 5 relevant withholding that's ongoing. You know, when we  
01:41:37 6 receive -- we received search terms from them, many of  
01:41:42 7 which triggered hundreds of thousands if not millions of  
01:41:45 8 hits, we got on the phone with them, we wrote them, we told  
01:41:49 9 them here's a problem. It has -- you know, we have all  
01:41:52 10 these hits as it's generating irrelevant stuff. You don't  
01:41:54 11 want this -- and we -- and we can't review two million  
01:41:59 12 hits, you know, that have this. And we've just never  
01:42:01 13 gotten any feedback like that --

01:42:05 14 THE COURT: Of course, you did that because you  
01:42:07 15 were trying to get them to change the search terms.

01:42:11 16 MR. KODISH: Yes, correct.

01:42:12 17 THE COURT: If you had accepted their search  
01:42:15 18 terms, you wouldn't have had to have had that discussion.

01:42:19 19 But anyway...

01:42:20 20 MR. KODISH: That's fair, Your Honor. So much of  
01:42:23 21 this is wound up in the burden that -- that is purportedly  
01:42:29 22 being undertaken to obtain relevant documents. But we just  
01:42:34 23 want to respond to that and understand what the burden is.

01:42:36 24 There are three more cases coming from -- that  
01:42:39 25 they filed. We're going to be here again trying to figure

01:42:43 1 that out. It just doesn't feel like an onerous thing to  
01:42:47 2 express. But that's our request humbly. We understand...

01:42:53 3 THE COURT: All right. I understand that. I am  
01:42:55 4 not going to include that in the order, however.

01:42:57 5 MR. KODISH: Understood, Your Honor.

01:42:58 6 THE COURT: What's next?

01:42:59 7 MR. KODISH: All right. Two left.

01:43:06 8 We are pivoting to Docket 116, and that is a  
01:43:21 9 privilege motion.

01:43:23 10 And from our status report, we provided the  
01:43:26 11 Court -- you understand that this is a two-issue motion.  
01:43:30 12 The first issue has been resolved by virtue of Headwater  
01:43:35 13 agreeing ultimately to reproduce the document that it  
01:43:41 14 clawed back at the Dave Johnson deposition. So that is  
01:43:46 15 resolved to that extent.

01:43:46 16 The second issue remains, which concerns the  
01:43:52 17 waiver as to pre-suit communications regarding suing or  
01:43:57 18 approaching Samsung.

01:43:59 19 Do you have it in front of you?

01:44:04 20 THE COURT: I do.

01:44:06 21 MR. KODISH: I don't want to be presumptive.

01:44:06 22 All right. So the context. What's this about?

01:44:10 23 Dr. Raleigh at his November 15th, 2023 deposition  
01:44:15 24 put at issue and waived the privilege concerning advice  
01:44:18 25 that counsel gave Headwater in 2016 through 2018 about

01:44:24 1 litigation strategy as to Samsung, specifically strategic  
01:44:30 2 decisions as to when to sue Samsung and why it  
01:44:34 3 intentionally chose not to inform Samsung of any alleged  
01:44:38 4 patent infringement prior to its filing of the 2022  
01:44:42 5 complaint.

01:44:44 6 For several reasons, we asked the Court to order  
01:44:47 7 that Headwater waive the privilege over its pre-filing  
01:44:51 8 communications about that subject matter.

01:44:57 9 First reason, as argued in Headwater's brief,  
01:45:01 10 Paragraph 1 on this subject, their lead argument is that  
01:45:05 11 Dr. Raleigh was a 30(b)(1) witness, and that somehow he,  
01:45:10 12 the long-time CEO of Headwater, could not waive the  
01:45:15 13 company's privilege.

01:45:16 14 That is undermined even further by the fact that  
01:45:23 15 Headwater later agreed with Samsung to designate the  
01:45:26 16 testimony from that very day as 30(b)(6) testimony of  
01:45:30 17 Headwater.

01:45:36 18 Second, Dr. Raleigh's quoted deposition testimony  
01:45:40 19 in Pages 2 to 3 of Samsung's opening brief speaks for  
01:45:43 20 itself. And I don't have a handy slide on it, but if you  
01:45:50 21 have the briefing, it's there. It's not too long. It's  
01:45:54 22 about a little over a page total. That testimony is about  
01:45:57 23 the advice that Headwater received concerning the risks of  
01:46:01 24 confronting or suing Samsung, and it is the divulging of  
01:46:09 25 privileged communications.

01:46:10 1 Dr. Raleigh explained that Headwater wanted to  
01:46:14 2 avoid IPRs, they wanted to avoid declaratory judgment  
01:46:18 3 actions, and try to secure a safe harbor channel for  
01:46:23 4 communications, and to secure litigation funding. And he  
01:46:28 5 explained that throughout 2016 and -- to 2018, Headwater  
01:46:33 6 had discussions with counsel about suing Samsung. And he  
01:46:39 7 lists the counsel that he had these discussions with on the  
01:46:46 8 top of Page 3, and they were Irell & Manella, Tensegrity,  
01:46:54 9 Caldwell Cassidy.

01:46:57 10 Now, it's no help to Headwater that they cite some  
01:47:04 11 Raleigh qualifying testimony stating the purported  
01:47:08 12 intention not to waive the privilege because from what he  
01:47:12 13 said, he went ahead and did it. No different than when a  
01:47:16 14 person says, I don't mean any offense, but insert the  
01:47:22 15 offensive comment.

01:47:23 16 It happens. His counsel was even more on notice  
01:47:28 17 of the possibility that a waiver was about to occur.  
01:47:32 18 Rather than taking a break to discuss or stopping  
01:47:36 19 Dr. Raleigh mid-sentence, he let him give the testimony.

01:47:40 20 Headwater's argument that this level of detail is  
01:47:46 21 mere privilege log level of detail, that fails. The Court  
01:47:50 22 has seen today Headwater's privilege log. We would welcome  
01:47:53 23 a privilege log that had this level of detail. Of course,  
01:47:58 24 that -- that's not the case at all. It doesn't disclose  
01:48:02 25 anything resembling the level of detail that Dr. Raleigh

01:48:05 1 provided on the issue of whether and when Headwater was  
01:48:09 2 going to sue Samsung back in 2016 to 2018.

01:48:17 3 Third, Headwater is employing, again, classic  
01:48:22 4 sword/shield tactics with this privileged assertion. As  
01:48:26 5 we've discussed in earlier motion context today and as  
01:48:30 6 their complaint makes plain, they're trying to tell an  
01:48:33 7 infringement story with a willfulness component by Samsung.

01:48:40 8 Because Headwater's infringement read in that  
01:48:43 9 complaint was based on Android source code that's been  
01:48:47 10 publicly available information since 2016 and earlier, we  
01:48:51 11 naturally didn't want to be surprised with some explanation  
01:48:54 12 at trial on why Headwater waited six years.

01:48:59 13 So we asked Headwater about it. And Headwater  
01:49:04 14 right then and there had a choice to make. They could have  
01:49:09 15 answered that the answer to this question is bound up with  
01:49:14 16 discussions with lawyers and, therefore, privileged, and  
01:49:19 17 that may well have been the end of the discussion.

01:49:21 18 But they didn't handle it that way. They decided  
01:49:25 19 to try and strengthen their case asking for willful  
01:49:29 20 infringement.

01:49:31 21 Dr. Raleigh saw it as an opportunity to draw -- to  
01:49:35 22 try and inject sword-like testimony, creating a David  
01:49:40 23 versus Goliath narrative that Samsung is one of these big  
01:49:43 24 companies that if you take action construed as threatening  
01:49:45 25 your patents, that Samsung would put a little company like



01:49:48 1 Headwater out of business with DJ -- declaratory judgment  
01:49:53 2 actions and IPRs.

01:49:54 3 THE COURT: So tell me what you think the most  
01:49:58 4 direct testimony from Dr. Raleigh was that is revealing  
01:50:06 5 advice of counsel.

01:50:09 6 MR. KODISH: Sure. So the -- we know from Page 3.  
01:50:12 7 We set the table. We're in the subject matter of  
01:50:18 8 discussions about suing Samsung. That is -- that is the  
01:50:22 9 context.

01:50:23 10 Did you have discussions about suing Samsung?

01:50:26 11 Yes, we had those with lawyers, Irell, Tensegrity,  
01:50:34 12 Caldwell Cassady.

01:50:35 13 And at the bottom, he says: We had them  
01:50:36 14 throughout the interim period you're asking about. We had  
01:50:36 15 these discussions.

01:50:37 16 So then we got to --

01:50:41 17 THE COURT: You know, where you asked about the  
01:50:43 18 lawyers, at least what I'm seeing on Page 3 of Document  
01:50:48 19 116 --

01:50:48 20 MR. KODISH: Uh-huh.

01:50:50 21 THE COURT: -- that was -- the question to him  
01:50:52 22 identifies law firms, and his answer is: I don't know.

01:50:56 23 MR. KODISH: He's -- he first says: I don't know.  
01:50:59 24 We weren't sure what was going to happen in 2016, so I  
01:51:05 25 don't really recall.

01:51:06 1 And then the question is: Did you have such  
01:51:06 2 discussions in 2017?

01:51:10 3 Answer: Likely.

01:51:11 4 What about 2018?

01:51:12 5 Answer: I mean, throughout the interim period  
01:51:15 6 you're asking about, we had these discussions.

01:51:19 7 We take this fairly to relate to -- yeah, these  
01:51:24 8 three questions and answers, they are all related.

01:51:28 9 THE COURT: And all of these are asking: Did you  
01:51:30 10 have discussions about suing Samsung?

01:51:33 11 MR. KODISH: That's right. Did you have  
01:51:34 12 discussions about suing Samsung in 2016 through 2018 with  
01:51:40 13 Irell, Tensegrity, or Caldwell Cassady?

01:51:45 14 THE COURT: And where is the advice of counsel  
01:51:47 15 that is being revealed?

01:51:50 16 MR. KODISH: Right. So then if we back up to  
01:51:52 17 Paragraph -- Page 2 of the brief, so there's a question  
01:51:58 18 about a meeting that we won't get into right now with a  
01:52:03 19 Mr. Park. But in response to this question, Dr. Raleigh  
01:52:07 20 takes it upon himself to elaborate in additional  
01:52:12 21 directions. You know, did you or anyone else at Headwater  
01:52:14 22 reach out to Samsung about potential infringement is the  
01:52:17 23 question.

01:52:18 24 Answer: So I recall discussions, some of which  
01:52:21 25 are privileged, discussing trying to establish a safe

01:52:24 1 harbor of discussion with Samsung where there wouldn't be a  
01:52:27 2 threat of a DJ on Headwater.

01:52:29 3 He -- he continues on, and I'm kind of tracking an  
01:52:36 4 emphasis to the bold language: It was risky for us to just  
01:52:39 5 say, hey, we think you might be infringing. That would  
01:52:43 6 have been based on the threat of a DJ that would have put  
01:52:46 7 the company out of business because we didn't have the  
01:52:48 8 funding to handle all the IPRs.

01:52:51 9 THE COURT: I don't see anything that says that  
01:52:54 10 conversation was with counsel.

01:52:56 11 MR. KODISH: Well, we are making a connection,  
01:53:01 12 Your Honor, and we think fairly that the subject matter --  
01:53:04 13 if you continue through this, is all about 2016 through  
01:53:10 14 2018, considering whether to approach Samsung, threaten  
01:53:15 15 patents, or sue them.

01:53:17 16 He explains that it concerned -- that lawyers were  
01:53:20 17 involved, right? He says that some of these discussions,  
01:53:26 18 some of which are privileged, and then on what we fairly  
01:53:30 19 understand as the same subject matter -- that is continuing  
01:53:32 20 on Page 3 -- where he specifically identifies that these  
01:53:37 21 privileged discussions that were integrated within this  
01:53:40 22 larger discussion were with Irell, Tensegrity, and Caldwell  
01:53:46 23 Cassady. And these concepts that he's discussing, these  
01:53:49 24 are legal concepts. These are legal analyses about  
01:53:53 25 strategizing. Do I file a lawsuit or not?

01:53:56 1 Here are the implications of threatening, right?  
01:54:01 2 When you're talking about declaratory judgment, you're  
01:54:03 3 talking about a -- kind of a nuanced legal concept that,  
01:54:09 4 you know, isn't just common knowledge at a cocktail party.  
01:54:11 5 You're talking about, you know, the law that puts you  
01:54:15 6 across the threshold of having opened yourself up to  
01:54:18 7 getting a declaratory judgment action brought against you.

01:54:21 8 Likewise, when you're talking about IPRs and the  
01:54:25 9 prospect that if you bring suit, all your patents will be  
01:54:29 10 thrown into these patent proceedings, back in 2016, people  
01:54:34 11 are digging in on legal strategy here, and he is revealing  
01:54:38 12 it.

01:54:40 13 He's -- he took the opportunity to use that legal  
01:54:45 14 advice and that legal strategy to excuse their laying  
01:54:50 15 behind the log on public information that is the subject of  
01:54:53 16 their infringement case for six years and to also create  
01:54:59 17 this visual, as he does in his second answer, you know,  
01:55:03 18 what is a DJ? It's declaratory judgment. It would be an  
01:55:06 19 IPR text. There's a lot of ways a big company can put a  
01:55:10 20 little company that's insufficiently funded out of  
01:55:12 21 business, and when they're approached to license patents, a  
01:55:14 22 little company believes they are infringed.

01:55:16 23 So now he has, you know, in his mind helped  
01:55:19 24 himself to be able to tell this story about why he  
01:55:24 25 waited -- entered into discussions with counsel during --

01:55:27 1 THE COURT: Mr. Kodish, I think what you lack here  
01:55:30 2 is anything that makes clear that any part of this came  
01:55:35 3 specifically from a discussion with counsel. The most  
01:55:41 4 direct thing you have is the question that is in the middle  
01:55:48 5 portion of Page 3: Did you have any discussions with these  
01:55:54 6 identified law firms about suing Samsung?

01:55:57 7 And so he has revealed that he had discussions  
01:56:00 8 about suing Samsung. The rest of that that has all the  
01:56:05 9 detail you're talking about, I don't see that as clearly  
01:56:10 10 linked to a communication with counsel. There are lots of  
01:56:15 11 people in the business world who have knowledge about all  
01:56:19 12 of the things you've pointed to. And I -- I don't think  
01:56:24 13 there's an adequate basis there to find a waiver of the  
01:56:29 14 privilege.

01:56:30 15 MR. KODISH: Thank you, Your Honor. And I  
01:56:32 16 understand that -- I understand that description.

01:56:35 17 If I could, you know --

01:56:40 18 THE COURT: Go ahead.

01:56:40 19 MR. KODISH: -- there's another interesting fact  
01:56:44 20 that, you know, bears on this, and it relates to the patent  
01:56:48 21 marking defense that Samsung has in this case. And, you  
01:56:55 22 know, in a nutshell, Headwater is -- is in part trying to  
01:57:02 23 make a marking -- save their marking problems by describing  
01:57:06 24 a conversation that took place between Dr. Raleigh and a  
01:57:13 25 retired engineer at Samsung in 2016. And that's this

01:57:16 1 Mr. Park you see in the first question.

01:57:19 2 And they have hit it very hard that there is --  
01:57:26 3 there was a verbal conversation that put Headwater --  
01:57:30 4 excuse me, Samsung on notice of patents, on notice of the  
01:57:33 5 ItsOn website that had patents. This whole discussion  
01:57:37 6 about how Dr. Raleigh told Samsung all about the patents,  
01:57:44 7 which is directly at odds with what's being described here.

01:57:50 8 Apparently, Dr. Raleigh had no understanding of  
01:57:53 9 this -- of these perils because just in 2016 himself, as  
01:58:00 10 he's made plain in this case, and they will not deny it,  
01:58:05 11 their position in interrogs and testimony is that he went  
01:58:08 12 and told Mr. Park all about the patents and enough for them  
01:58:13 13 to be on notice of it and where the marking was and all  
01:58:15 14 that.

01:58:15 15 So he didn't know. He did not know based on that  
01:58:20 16 or did -- and it looks like this legal advice that he's  
01:58:24 17 reporting here on Page 2 was, I suppose, a new course of  
01:58:31 18 conduct. But he didn't -- he didn't know it as he rolled  
01:58:38 19 into the discussion of this communication.

01:58:39 20 THE COURT: What does this have to do with waiver  
01:58:41 21 of privilege?

01:58:42 22 MR. KODISH: Well, it certainly has to do with --  
01:58:44 23 it has to do with fairness and the believability that he  
01:58:48 24 came into this exactly as you supposed, Your Honor, that  
01:58:51 25 this was just business people, non-lawyer know-how, as

01:58:56 1 opposed to lawyers telling him these legal concepts to  
01:59:02 2 inform his strategy.

01:59:03 3 THE COURT: You know, the fact that a lawyer may  
01:59:04 4 have educated his client doesn't mean that when the client  
01:59:10 5 later demonstrates the familiarity with what the lawyer has  
01:59:16 6 been telling him, that that waives the privilege.

01:59:22 7 Are you suggesting that because Dr. Raleigh was  
01:59:28 8 first introduced to what a DJ is by a lawyer, that he is  
01:59:33 9 waiving the privilege when he later talks about DJs?

01:59:36 10 MR. KODISH: I'm -- I'm not suggesting that. I'm  
01:59:40 11 suggesting that the combination of these two passages, you  
01:59:46 12 know, we read as reasonably understood to be related, that  
01:59:50 13 he's revealing the communications with these firms, but I  
01:59:55 14 understand Your Honor is not seeing it that way.

01:59:57 15 So I don't know if I have anything new to say that  
02:00:00 16 would be interesting to you.

02:00:01 17 THE COURT: You understand correctly. And I'll --  
02:00:04 18 I'll deny the portion of the motion in Document 116 that  
02:00:14 19 claims a waiver of privilege.

02:00:17 20 MR. KODISH: All right. We have one issue left,  
02:00:22 21 Your Honor, and that is Docket 136.

02:00:24 22 And as we informed in the status report, this one  
02:00:37 23 has been trimmed a decent amount, which is great. But  
02:00:42 24 there are 10 interrogatories that we still have a complaint  
02:00:51 25 about that we're asking for essentially a narrative

02:00:56 1 response.

02:00:58 2 So, you know, I can put it pretty succinctly, and  
02:01:04 3 then I can take them one-by-one, but --

02:01:10 4 THE COURT: Where would I find the  
02:01:12 5 interrogatories?

02:01:12 6 MR. KODISH: Oh, oh, sure. So there's an exhibit  
02:01:16 7 to the -- to the brief, but based on page limits, you know,  
02:01:21 8 we couldn't -- we couldn't fit them all in.

02:01:23 9 I have the interrogatories that are at issue with  
02:01:30 10 the responses.

02:01:38 11 Thank you.

02:01:49 12 So the summary discussion is this. For these  
02:01:53 13 interrogatories, the response in general that Headwater  
02:02:00 14 gave was to point to old depositions, as many as eight or  
02:02:09 15 nine depositions, and say look there. No page numbers, no  
02:02:17 16 specifics. In a few of the instances, they pointed to  
02:02:22 17 other interrogatory responses which although those two or  
02:02:27 18 three interrogatory responses had some narrative, to be  
02:02:35 19 sure, minimally overlapping with what was asked in the rogs  
02:02:40 20 here at issue.

02:02:41 21 So the request is that we get a narrative response  
02:02:46 22 or, you know, if they're resting on 33(d), they do it with  
02:02:50 23 the specificity that the rule requires. You know, we think  
02:02:52 24 the law is pretty clear in this district and beyond that  
02:02:55 25 pointing to 10 deposition transcripts for an interrogatory



02:03:02 1 is -- is not acceptable.

02:03:05 2 THE COURT: Pick out the one of these  
02:03:07 3 interrogatories that you think is the most obvious abuse of  
02:03:13 4 Rule 33(d) or --

02:03:16 5 MR. KODISH: Sure. I haven't really ranked them,  
02:03:20 6 but, you know, ItsOn document preservation, No. 19. We'd  
02:03:29 7 like to know what their -- what Headwater knows, and we  
02:03:32 8 know those -- we've heard today those companies were pretty  
02:03:35 9 tight -- what was -- what is Headwater's knowledge of the  
02:03:40 10 ItsOn document preservation.

02:03:42 11 And, you know, we have just -- they said: They  
02:03:47 12 incorporate the entirety of deposition of Dr. Gregory  
02:03:51 13 Raleigh -- that's three days of deposition -- of James  
02:03:54 14 Harris, who is a person who testified that he never worked  
02:03:56 15 for ItsOn. They then pointed to the full depositions of  
02:04:00 16 Jeff Green, James Fitzgerald, and James Lavine, all former  
02:04:06 17 employees.

02:04:08 18 And his examples of what happens here, when you go  
02:04:09 19 to look at Raleigh's testimony, he testified that when he  
02:04:13 20 was in charge of ItsOn, they had a general policy of not  
02:04:15 21 destroying stuff. But others testified that there was no  
02:04:19 22 policy to retain things, that they used something called  
02:04:22 23 G Suite, Google Docs that could be overwritten.

02:04:26 24 Headwater supplemented this -- this response on  
02:04:29 25 April 2nd, citing the exact language in the Raleigh

02:04:35 1 declaration that they submitted regarding Headwater  
02:04:37 2 privilege log saying ItsOn's docs went to an ABC company in  
02:04:42 3 2018 when it went out of business. But that -- picking --  
02:04:46 4 cherry picking one day at the very end of the lifespan as  
02:04:50 5 to what happened to the docs in 2018 is -- is not answering  
02:04:54 6 this question, which is for the duration of this company,  
02:04:58 7 what was their document retention policy? There are huge  
02:05:02 8 issues in this case about missing documents, specifically  
02:05:04 9 from ItsOn. There are motions pending in regards to that.

02:05:07 10 And, you know, we certainly know from Greg  
02:05:07 11 Raleigh's March 14th declaration, he is capable of putting  
02:05:14 12 pen to paper and putting a very comprehensive explanation  
02:05:19 13 down on something as straightforward as this, but he hasn't  
02:05:23 14 done it.

02:05:24 15 So that would be an example.

02:05:26 16 THE COURT: This interrogatory is directed to  
02:05:28 17 Headwater?

02:05:29 18 MR. KODISH: That's right.

02:05:30 19 THE COURT: But it's about ItsOn, and you --  
02:05:33 20 you're making the interrogatory to Headwater because ItsOn  
02:05:37 21 is no longer --

02:05:40 22 MR. KODISH: Yeah, ItsOn is no -- we subpoenaed  
02:05:43 23 them, ItsOn, who -- you know, the Russ August firm accepted  
02:05:51 24 a subpoena, and then later said, no, they're defunct, and  
02:05:54 25 they -- there's nothing that -- there's no company here to

02:05:55 1 respond to this subpoena.

02:05:56 2 And so, you know, we're directing this at  
02:05:59 3 Headwater because of all you've heard about, the fact that  
02:06:02 4 ItsOn is center stage in Headwater's case, that for all the  
02:06:05 5 reasons that Headwater says that they were intermingled, we  
02:06:10 6 want to find out what Headwater's knowledge is.

02:06:12 7 And if Headwater comes back and says, you know, we  
02:06:15 8 have no idea what ItsOn's document retention policy is,  
02:06:19 9 that will be their answer. That will be interesting --  
02:06:21 10 that would be an interesting answer based on what they've  
02:06:23 11 described about the two interrelationship, but we just --  
02:06:24 12 we want their answer. We don't want to be pointed to 10  
02:06:29 13 depositions that spanned thousands of pages.

02:06:31 14 THE COURT: All right. Let me hear the response  
02:06:48 15 to that.

02:06:48 16 MR. TSUEI: Good afternoon, Your Honor. James  
02:06:49 17 Tsuei for Headwater.

02:06:49 18 So I confess that these issues relating to ItsOn's  
02:06:55 19 document retention policy and ItsOn code and ESI and emails  
02:06:58 20 is a fresh one because it's central to one of the motions  
02:07:01 21 that are currently pending but not set for hearing today  
02:07:08 22 and for which Headwater filed an opposition this Monday of  
02:07:11 23 this week.

02:07:11 24 So to the extent the Court thinks it would be  
02:07:14 25 helpful, it can refer to the parties' papers on that motion

02:07:19 1 as well, for additional factual context to the extent that  
02:07:22 2 we don't suss out that context today.

02:07:24 3 So there are a couple of issues with, I think,  
02:07:30 4 Mr. Kodish's arguments about Headwater's response to Rog  
02:07:35 5 19. The first is Headwater is not ItsOn. And Headwater,  
02:07:39 6 as far as I know, I think can't fairly be pegged to have  
02:07:43 7 corporate knowledge about ItsOn's document retention  
02:07:46 8 policy.

02:07:47 9 Now, as a factual matter, as is borne out in the  
02:07:50 10 depo testimony in the case, our understanding is documents  
02:07:53 11 just were not destroyed by ItsOn throughout I think the  
02:07:56 12 relevant time period. And when all of the ItsOn assets,  
02:08:00 13 including emails and the source code and the compiled code  
02:08:02 14 were sold to Sherwood Partners and transferred to Sherwood  
02:08:08 15 Partners' -- let's call it the ABC vehicle -- everything  
02:08:10 16 was sent over, including physical servers, hard drives,  
02:08:13 17 their paper documents, as well as email repositories.

02:08:17 18 THE COURT: And is that reflected in the  
02:08:19 19 depositions that you have mentioned in your response?

02:08:24 20 MR. TSUEI: I think so, Your Honor. And this is  
02:08:27 21 why I referred the Court to the additional factual context  
02:08:30 22 the parties have set out in the currently pending motion  
02:08:36 23 for sanctions.

02:08:37 24 THE COURT: Is there any reason why your response  
02:08:41 25 cannot indicate the portions of the depositions that you

02:08:46 1 contend constitute the knowledge of Headwater on this  
02:08:50 2 issue?

02:08:50 3 MR. TSUEI: Well, we certainly can, although,  
02:08:55 4 again, the issue of corporate formalities, I think, should  
02:09:00 5 be observed.

02:09:00 6 Now, these individuals who we've identified under  
02:09:03 7 33(d), gave testimony not only in their corporate capacity  
02:09:05 8 as representatives of Headwater, but I think in most cases  
02:09:07 9 gave their testimony in their capacity as 30(b)(1)  
02:09:12 10 witnesses.

02:09:12 11 Now, certainly, I guess Headwater's attorneys can  
02:09:15 12 look at that testimony, even if it was given under  
02:09:18 13 30(b)(1), and say this, this, and this is sort of the  
02:09:21 14 accurate understanding that Headwater as the corporate  
02:09:24 15 entity has about this topic. And I don't think there's  
02:09:26 16 anything preventing us from doing that if that's what the  
02:09:30 17 Court thinks is necessary.

02:09:32 18 THE COURT: I do think that that is appropriate.  
02:09:34 19 I think that it is easier for you to know which portions of  
02:09:39 20 those depositions you think constitute the knowledge of  
02:09:44 21 Headwater about this issue.

02:09:49 22 I understand your point that Headwater, as an  
02:09:54 23 entity, may not have much knowledge, but given the overlap  
02:10:00 24 in these two entities and the fact that several of these  
02:10:04 25 deponents have experience with both, I think that the

02:10:09 1 appropriate answer is not 33(d), it's to provide a more  
02:10:18 2 precise cite to that deposition testimony.

02:10:22 3 Because of the nature of it, I'm -- I would be  
02:10:27 4 tempted to order the narrative response that's being asked,  
02:10:32 5 but given the fact that it is a different legal entity, I  
02:10:39 6 think citing to the depositions is a reasonable response,  
02:10:48 7 but I do think you need to cite to page and line that is  
02:10:53 8 relevant as opposed to just all of the deposition  
02:10:58 9 testimony.

02:10:58 10 MR. TSUEI: Headwater has got no problem with  
02:11:02 11 that, Your Honor. Fortunately, I think the parties both  
02:11:05 12 know what parts of the depositions are relevant since  
02:11:09 13 they're in the briefing. But we'll endeavor to provide an  
02:11:12 14 admitted response to Rog 19 along those lines as well.

02:11:17 15 THE COURT: All right. Let me turn it back over  
02:11:26 16 to Mr. Kodish.

02:11:26 17 MR. KODISH: Sure. And rounding out 19, I just --  
02:11:35 18 I'm anticipating them pointing to two completely  
02:11:39 19 contradictory pieces of discussion that I wonder how I'm to  
02:11:43 20 take that without a narrative to say what actual --  
02:11:47 21 Headwater's understanding is, but...

02:11:49 22 THE COURT: You can take it as a -- the gift of  
02:11:53 23 impeachment.

02:11:53 24 MR. KODISH: Yeah, yeah, all right. We like  
02:11:57 25 those.

02:11:57 1 All right. So ItsOn history and formation was Rog  
02:12:05 2 18. That was the first one. Headwater cited 30 -- 33(d)  
02:12:11 3 of three docs, all of which essentially look the same that  
02:12:14 4 are Headwater terminating the license with ItsOn in 2018.  
02:12:19 5 And then they incorporate the deposition -- the entire  
02:12:22 6 deposition testimony of six people, including people that  
02:12:26 7 no longer work for Headwater and a Samsung employee.

02:12:29 8 You know, we -- we want Headwater's position for  
02:12:33 9 exactly the reason you stated, Your Honor, that this case  
02:12:36 10 is special. They are taking the position of this  
02:12:40 11 interrelationship was critical to the overall case, that it  
02:12:45 12 is the -- you know, the centerpiece of their willfulness of  
02:12:49 13 some copying story. And, you know, we want their answers.

02:12:55 14 Greg Raleigh, he knows how to answer this. He  
02:12:58 15 knows how to write the declaration of the interrelationship  
02:13:02 16 between Headwater and ItsOn. He wrote it in that March  
02:13:04 17 14th declaration that Mr. Graubart went through in detail.

02:13:07 18 So we would like the ItsOn history and formation  
02:13:11 19 to the extent he -- and essentially, he's the only material  
02:13:14 20 employee at Headwater -- to the extent he knows it.

02:13:23 21 I could just march through these kind of quickly,  
02:13:26 22 or we can go back and forth, whatever you prefer, Your  
02:13:29 23 Honor.

02:13:29 24 THE COURT: I'm looking at 18.

02:13:33 25 MR. KODISH: Sure.

02:13:34 1 THE COURT: And what I'm trying to do is figure  
02:13:37 2 out whether I think you've done a reasonable job in  
02:13:40 3 focusing it on what is relevant to your dispute.

02:13:52 4 Why is the, quote, the nature of ItsOn's  
02:13:56 5 businesses since foundation to present day, why is that  
02:14:02 6 something that Headwater should have to produce or  
02:14:08 7 describe?

02:14:08 8 MR. KODISH: Well, a number of reasons. But, you  
02:14:16 9 know, one of the things that we, you know, really hit on  
02:14:21 10 early, continuously, and have never really gotten a  
02:14:24 11 satisfactory understanding of is you read the ItsOn -- the  
02:14:28 12 Headwater complaint, you see all of these descriptions,  
02:14:31 13 vague descriptions of ItsOn technology, ItsOn IP, ItsOn  
02:14:37 14 software, ItsOn proprietary stuff, and you try and nail  
02:14:42 15 down, you know, what are they referring to, who came up  
02:14:45 16 with it, which one are they saying is practiced by patents,  
02:14:51 17 and, you know, it's been extremely difficult to suss out  
02:14:55 18 what exactly ItsOn did.

02:14:59 19 In our motion for sanctions, we explained how they  
02:15:01 20 never were able to produce the ItsOn source code that is we  
02:15:07 21 think their responsibility on the marking defense. And  
02:15:10 22 then, you know, ultimately, so many questions -- you know,  
02:15:15 23 we're trying to figure out whether Dr. Raleigh was wearing  
02:15:18 24 his ItsOn hat or his Headwater hat.

02:15:21 25 You know, he talks about how he met with Dr. Park



1 in 2016, but he was -- he was there with a group of ItsOn  
2 people, but he was also talking about Headwater. And, you  
3 know, all these issues of notice are bound up in -- and  
4 just the confusion about what is the delineation between  
5 these companies, what was the history of its formation.  
6 And, you know, in -- in a reasonably described, not, you  
7 know, we did this on Monday, we did this on Wednesday, but  
8 a reasonably described understanding of Headwater to meet  
9 what's asked in Rog 18.

10 They just simply punted on it. They just point to  
11 six people. You know, Dan Durig, a Samsung employee, you  
12 know, he doesn't have Headwater's knowledge of the  
13 formation and history of ItsOn. They just -- you know, we  
14 just take this as them assuming that we wouldn't press  
15 this, but we would like something that conforms with the  
16 rules. We think it's understandable.

17 THE COURT: What you described as coming from  
18 Headwater's complaint is meaningful. I think that if  
19 Headwater is going to refer to something as ItsOn  
20 technology, that they have an obligation to explain what  
21 technology they're referring to.

22 I don't know that a lot of what's in this  
23 interrogatory really falls into that. The structure and  
24 evolution and individuals involved in ItsOn seems to me to  
25 go well beyond what Headwater would have any obligation to

02:17:09 1 know.

02:17:12 2 MR. KODISH: You know, I come back to we're  
02:17:13 3 comfortable with them telling us they don't know the  
02:17:17 4 answer, and that will be interesting. And it may waft into  
02:17:22 5 exactly what you described as the gift of impeachment.  
02:17:24 6 There's a lot of record that's been made where they ebb and  
02:17:28 7 flow about knowing a lot and knowing very little.

02:17:31 8 But they had -- these aren't two companies that  
02:17:35 9 inhabited different spaces who were attached by occasional  
02:17:38 10 phone calls. They had the same -- they had a common  
02:17:41 11 founder, a common CEO, a common CFO, they worked in the  
02:17:45 12 same space, they used the same lawyers. You know, it --  
02:17:49 13 you've seen the arguments they've made to protect their  
02:17:52 14 communications here today. And, you know, we think that  
02:17:56 15 this is a special relationship, and Headwater should be  
02:17:58 16 able to describe what it knows in response to this -- this  
02:18:01 17 rog.

02:18:08 18 THE COURT: All right. Thank you, Mr. Kodish.

02:18:19 19 MR. TSUEI: Good afternoon, Your Honor. James  
02:18:20 20 Tsuei for Headwater.

02:18:21 21 Before I go into the specifics of Rog No. 18, I  
02:18:26 22 will note, you know, with some concern that the bulk of the  
02:18:30 23 interrogatory responses that concern the rogs that Samsung  
02:18:34 24 believes are still at issue in this case were not attached  
02:18:37 25 to their discovery motion. And to this date, our

02:18:41 1 understanding is the discovery requests and responses --  
02:18:44 2 the responses have not been provided to the Court, at least  
02:18:48 3 up until just now when Mr. Kodish handed the Court and  
02:18:51 4 opposing counsel what looks like a copy of a document that  
02:18:55 5 has copied and pasted portions of responses served in the  
02:18:59 6 case.

02:19:00 7           So, you know, with that note and without  
02:19:03 8 necessarily saying that Samsung failed to meet their  
02:19:06 9 initial burden, which I think they have, we're happy to  
02:19:08 10 talk about the merits, though. So that's what I'll do now.

02:19:11 11           THE COURT: Well, one thing that I would  
02:19:13 12 appreciate your talking about is the extent to which  
02:19:16 13 Headwater has referred to this ItsOn entity in its  
02:19:24 14 pleadings.

02:19:26 15           MR. TSUEI: Your Honor's question is why Headwater  
02:19:29 16 has referred to ItsOn?

02:19:30 17           THE COURT: The extent to which you have, and I --  
02:19:34 18 I think that if you are referring to ItsOn in your  
02:19:38 19 complaint and/or other pleadings, that you have a greater  
02:19:45 20 obligation to respond to discovery about it.

02:19:49 21           MR. TSUEI: I think as a -- as a general matter,  
02:19:52 22 that's right, and we would agree with that. The problem  
02:19:55 23 is, as we saw it, you know, when we were discussing this  
02:19:58 24 issue with Samsung before the motion was filed is that the  
02:20:02 25 interrogatory was just too broad.

02:20:03 1 And so, you know, I think we in good faith tried  
02:20:05 2 to figure out exactly what they were looking for, and what  
02:20:09 3 we thought that they were looking for is in the middle of  
02:20:11 4 the rog, which is the reason ItsOn failed to pay royalties  
02:20:15 5 required by the license agreement between ItsOn and  
02:20:18 6 Headwater.

02:20:18 7 And we saw the rest of the rog basically from the  
02:20:22 8 beginning to the middle portion as clearly overbroad,  
02:20:26 9 calling for a description of the history of a company that  
02:20:30 10 is not Headwater. And so, you know, we tried to meet and  
02:20:35 11 confer about it and ask them what they were looking for.  
02:20:38 12 As far as I understand, before the motion was filed, they  
02:20:41 13 did not agree to narrow any portion of the rog, and so  
02:20:45 14 that's why we're here.

02:20:46 15 You'll see that our response does, in fact,  
02:20:49 16 address the reason ItsOn failed to pay royalties as  
02:20:52 17 required by the license agreement between ItsOn and  
02:20:54 18 Headwater. Fortunately, this is one of the rogs whose  
02:20:59 19 responses were provided to the Court by Samsung, I think  
02:21:03 20 out of luck, and it's one that we've addressed in the  
02:21:05 21 papers, as well, where we've described the documents -- and  
02:21:08 22 I'll do it now again -- as the communications between  
02:21:11 23 Headwater and ItsOn relating to ItsOn's failure to pay  
02:21:15 24 royalties. And I think there are some email chains, as  
02:21:18 25 well, cited in those 33(d) documents.

02:21:21 1 So I confess we're probably at a standstill still  
02:21:28 2 unless the Court believes that the full scope of the rog is  
02:21:31 3 appropriate to be responded to. But, otherwise, we -- we  
02:21:35 4 don't think that the full scope of the rog is appropriate.

02:21:37 5 And, again, we invite Samsung to explain with  
02:21:41 6 specificity exactly what they're looking for.

02:21:44 7 THE COURT: You know, Mr. Tsuei, I'm looking at  
02:21:46 8 your complaint now, and I see that the complaint alleges  
02:21:54 9 that Dr. Raleigh founded ItsOn in 2008 and goes on to  
02:21:58 10 follow the progress of ItsOn through the years. There are  
02:22:08 11 pages of allegations regarding ItsOn and its business. And  
02:22:16 12 given those allegations, I'm going to grant the motion and  
02:22:21 13 order that the -- that Headwater provide a narrative  
02:22:27 14 response to Interrogatory No. 18. I think Headwater has  
02:22:32 15 made that relevant by its reliance on ItsOn in its  
02:22:38 16 complaint.

02:22:42 17 MR. TSUEI: Thank you, Your Honor.

02:22:43 18 MR. KODISH: Continuing on, Interrogatory No. 20.  
02:22:51 19 I think this one may fall into a similar conclusion. This  
02:22:58 20 is the market and demand for the ItsOn software, which  
02:23:02 21 allegedly practiced the claims of the asserted patents.

02:23:06 22 So as you're now familiarizing yourself with the  
02:23:12 23 complaint, that's the showpiece of their story. And we  
02:23:20 24 would like a narrative response to -- to the rog  
02:23:26 25 explaining -- you know, responding to it.

02:23:27 1           They just -- they point us to a single doc that  
02:23:30 2 shows the sales of some ItsOn product, and then they  
02:23:37 3 incorporate the entire depositions of Greg Raleigh --  
02:23:40 4 that's three days of depositions -- Jeff Green, James  
02:23:43 5 Fitzgerald, James Lavine, and Dan Durig who's not a  
02:23:46 6 Headwater employee, he's a Samsung employee. And then they  
02:23:50 7 point to their answers to these three rogs that I mentioned  
02:23:54 8 at the outset, which have some small overlap but certainly  
02:24:02 9 do not answer in their entirety. They are not even close  
02:24:06 10 to identical as to what they are asking for.

02:24:07 11           Rog 20, as to -- as compared to Rog 4, 9, and 11.  
02:24:13 12 They don't provide competitors, the competitive products.  
02:24:17 13 They don't explain what, if any, demand there is for ItsOn  
02:24:20 14 software. They point to a lot of irrelevant material.  
02:24:23 15 They seem to be answering a question about whether Samsung,  
02:24:26 16 quote, unquote, wanted the -- the product. This is about  
02:24:29 17 what is the market? What do the end users, you know, find  
02:24:35 18 valuable about the ItsOn product that is the centerpiece of  
02:24:39 19 their complaint?

02:24:39 20           THE COURT: I see that Interrogatories 20 and 21  
02:24:43 21 are about ItsOn, and then it looks like 28 --

02:24:48 22           MR. KODISH: Yeah.

02:24:48 23           THE COURT: -- is different.

02:24:49 24           Are there others about ItsOn that you're seeking?

02:24:52 25           MR. KODISH: Yeah, you've nailed it exactly.

02:24:54 1 21 is just the R&D perspective, but they're asking  
02:24:58 2 for \$3.1 billion. We'd like the narrative response on --  
02:25:01 3 to understand what they invested in this technology that  
02:25:03 4 they say is worth that much.

02:25:17 5 THE COURT: Well, I'll ask Mr. Tsuei to tell me  
02:25:19 6 what objections he has to the contents of 20 and 21 then.

02:25:43 7 MR. TSUEI: Hello, Your Honor. Again, James Tsuei  
02:25:45 8 for Headwater.

02:25:45 9 So just sticking with the Court's preference to  
02:25:49 10 stay with Rogs 20 and 21 --

02:25:51 11 THE COURT: Yes.

02:25:51 12 MR. TSUEI: -- I think our view is that, again,  
02:25:55 13 these rogs are -- without actually narrowing by, you know,  
02:25:59 14 meetings of the minds between the parties -- overbroad.

02:26:03 15 This is unfortunately an issue that's occurred  
02:26:06 16 frequently in this case where we've sought sort of a  
02:26:08 17 narrowing proposal from Samsung as to what we believe were  
02:26:11 18 overbroad interrogatory requests. These were, as I  
02:26:14 19 understand it, ones where there was no compromise offered,  
02:26:17 20 so I'll start with that.

02:26:18 21 THE COURT: So tell me what changes you're seeking  
02:26:22 22 in the scope of 20 and 21.

02:26:24 23 MR. TSUEI: Well, to the extent that I think what  
02:26:28 24 they're looking for is contained in deposition testimony,  
02:26:31 25 that is, testimony that discusses the ItsOn software, as

02:26:35 1 well as the -- the business that ItsOn did with customers  
02:26:39 2 and prospective customers, that's all set forth in the  
02:26:42 3 deposition testimony of many witnesses in the case.

02:26:45 4 And the reason why we identify Samsung's witness  
02:26:49 5 as well, Mr. Durig, is because Samsung was, in fact, one of  
02:26:53 6 those customers. So Samsung already knows, in fact, what  
02:26:55 7 the ItsOn software is. Samsung installed the software on  
02:26:58 8 its own phones.

02:26:59 9 So at the end of the day, I'm at a loss to sort of  
02:27:02 10 understand exactly what they're looking for that they  
02:27:04 11 consider is not already in the evidence of this case.

02:27:06 12 So with that said, we can put all of that in  
02:27:11 13 writing, but it's information that's already set forth not  
02:27:14 14 only in declarations in the case but in the pleadings and  
02:27:16 15 the depositions in the case as well.

02:27:19 16 THE COURT: Well, I think that you have made these  
02:27:22 17 issues relevant by the way you have relied upon ItsOn in  
02:27:28 18 your complaint, and I'll grant the motion to require a  
02:27:33 19 narrative response not reliant upon Rule 33(d) for  
02:27:40 20 Interrogatory 20 and 21.

02:27:42 21 MR. TSUEI: Your Honor, if I may.

02:27:44 22 THE COURT: You may.

02:27:45 23 MR. TSUEI: So Interrogatory 21 is materially  
02:27:49 24 different, though it's related.

02:27:51 25 It's seeking, by its terms, the total amount of



02:27:55 1 investment in the research and development of the ItsOn  
02:27:57 2 software. So using that as a starting point, I'm not quite  
02:28:02 3 sure it would be possible or feasible for Headwater to  
02:28:05 4 offer a narrative response describing that.

02:28:07 5 THE COURT: Well, you can -- that certainly can be  
02:28:09 6 your narrative response that you do not know.

02:28:12 7 MR. TSUEI: Okay. In that case, then, we're happy  
02:28:14 8 to actually say that.

02:28:19 9 THE COURT: That's fine. It doesn't call on you  
02:28:21 10 to provide any facts that you don't know.

02:28:25 11 MR. TSUEI: Understood, Your Honor.

02:28:43 12 MR. GRAUBART: Your Honor, Noah Graubart for  
02:28:45 13 Samsung.

02:28:46 14 If I could briefly address Interrogatories 28 and  
02:28:49 15 30, which I believe are the next two at issue in the  
02:28:52 16 motion.

02:28:52 17 THE COURT: All right.

02:28:54 18 MR. GRAUBART: Hopefully this will be a very quick  
02:28:56 19 discussion, because in our view, these are bound up in the  
02:29:00 20 privilege disputes that Your Honor heard this morning.

02:29:03 21 And so -- because Headwater did supplement their  
02:29:07 22 responses to these interrogatories after our motion, and  
02:29:10 23 the only issue then left from our perspective was whether  
02:29:14 24 it included the information being withheld as privileged.

02:29:17 25 So No. 30 goes specifically to the issue that

02:29:20 1 Your Honor ruled upon in Docket No. 137 concerning the  
02:29:25 2 waiver of privilege surrounding the supposed hundreds of  
02:29:29 3 millions of dollars and the value that was going to be  
02:29:32 4 received from InterDigital. So we would understand that  
02:29:35 5 based on Your Honor's ruling on 137, that we would ask that  
02:29:39 6 this Interrogatory No. 30, the response be supplemented to  
02:29:43 7 include that -- the same information that Your Honor has  
02:29:46 8 found is not covered by privilege or is waived as to  
02:29:49 9 privilege.

02:29:49 10 And then relatedly, No. 28 relates to the  
02:29:55 11 circumstances under which InterDigital chose not to follow  
02:30:00 12 through with the transaction to purchase Headwater. And  
02:30:03 13 that, I think, is bound up in the aspects of Docket No. 88  
02:30:08 14 and 100 that Your Honor took under advisement as to whether  
02:30:11 15 the communication between InterDigital and Headwater are,  
02:30:15 16 in fact, protected by common interest privilege. And if  
02:30:18 17 they're not, then we ask that the responses to this be  
02:30:22 18 supplemented with that material that's been withheld as  
02:30:26 19 privileged.

02:30:27 20 THE COURT: All right.

02:30:27 21 MR. GRAUBART: Thank you.

02:30:38 22 MR. TSUEI: James Tsuei for Headwater.

02:30:38 23 I'd like to address 28 and 30 separately because I  
02:30:45 24 do think that they are different, materially speaking.

02:30:47 25 So starting with 28, I think the -- the answer is

02:30:52 1 Headwater has provided a narrative response describing why  
02:30:55 2 the InterDigital deal ultimately was not closed.

02:30:59 3           You'll see that narrative response -- I'm not  
02:31:04 4 quite sure what page this is, but under the heading: First  
02:31:08 5 Supplemental Response to Interrogatory No. 28.

02:31:13 6           So perhaps it sounds like Samsung is seeking a  
02:31:18 7 more detailed narrative response, but at the end of the  
02:31:21 8 day, the reason is the parties could not agree to the  
02:31:27 9 terms. And we've cited documents establishing reasons why  
02:31:31 10 the deal didn't close, as well as specific deposition  
02:31:36 11 testimony speaking to the same issue.

02:31:48 12           THE COURT: Well, if the answer to 38 is not  
02:31:53 13 changed as a result of the ruling that has been carried,  
02:31:59 14 then I find it is sufficient. And depending on how that  
02:32:06 15 goes, you may need to supplement, but I don't think that  
02:32:11 16 there's a further ruling that I can make on 28 at this  
02:32:15 17 time.

02:32:17 18           On 30, I would think that you should supplement  
02:32:24 19 your response to Interrogatory 30 in view of the waiver  
02:32:32 20 finding earlier today.

02:32:33 21           MR. TSUEI: If Your Honor is willing to hear some  
02:32:36 22 argument about that, I think I can speak to this issue,  
02:32:38 23 which leads us to believe --

02:32:40 24           THE COURT: Go ahead.

02:32:41 25           MR. TSUEI: So the interrogatory doesn't say and

02:32:44 1 doesn't ask for, as far as we know, information that, you  
02:32:48 2 know, would be describing Headwater's belief or rather  
02:32:51 3 Dr. Raleigh's belief that the deal was worth anywhere from,  
02:32:56 4 you know, more than 60 million to hundreds of millions of  
02:32:59 5 dollars.

02:32:59 6 The interrogatory is actually worded quite  
02:33:04 7 directly and expressly, seeking the total value or benefit  
02:33:07 8 Headwater anticipated receiving from InterDigital. I think  
02:33:12 9 a fair answer is, it's what's on the paper. It's what  
02:33:15 10 Headwater actually expected to get, and we've described in  
02:33:19 11 our supplemental response exactly that. We expected to get  
02:33:24 12 \$60 million as part of the closing of the deal.

02:33:29 13 Now, if the interrogatory were worded more  
02:33:32 14 broadly --

02:33:32 15 THE COURT: Do you say that in your answer?

02:33:34 16 MR. TSUEI: Yes, sir. It would be --

02:33:36 17 THE COURT: Oh, that's the supplemental answer?

02:33:38 18 MR. TSUEI: Correct, Your Honor.

02:33:46 19 So my issue with Your Honor's initial inclination  
02:33:50 20 of accepting Mr. Graubart's representation that the waiver  
02:33:54 21 issue is bound up with Rog 30 I think is incorrect because  
02:33:55 22 the rog is not so worded.

02:33:56 23 If the rog were worded differently, something to  
02:34:00 24 the effect of state the basis and explain, you know, why  
02:34:02 25 you believe that the InterDigital deal was worth more than

02:34:05 1 \$60 million, the face value of the agreement, please  
02:34:09 2 explain why. But that's not what the rog says.

02:34:12 3 THE COURT: It says to identify the total value  
02:34:16 4 and/or benefit Headwater anticipated receiving.

02:34:22 5 And how is that not more than the 60 million in  
02:34:27 6 view of the testimony of Dr. Raleigh?

02:34:30 7 MR. TSUEI: Well, I don't think it's more than 60  
02:34:33 8 million. What Headwater expected to receive at the close  
02:34:35 9 of the deal was \$60 million.

02:34:37 10 THE COURT: Nothing says at the close of the deal,  
02:34:41 11 does it?

02:34:41 12 MR. TSUEI: I think that's right. But the  
02:34:45 13 language here, and I don't want to be unnecessarily  
02:34:50 14 nit-picky, it says: Pursuant to the acquisition described  
02:34:53 15 in the 2020 letter of intent. And that's why we, Your  
02:34:56 16 Honor, I think reasonably focused on the letter of intent,  
02:34:58 17 to explain to Samsung what we thought the letter of intent  
02:35:03 18 indicated would be the value received by Headwater.

02:35:07 19 THE COURT: Pursuant to the potential acquisition,  
02:35:11 20 that's the acquisition by InterDigital of the Headwater  
02:35:19 21 patents?

02:35:20 22 MR. TSUEI: Yes, Your Honor, that's right.

02:35:21 23 THE COURT: And isn't that what Dr. Raleigh  
02:35:25 24 testified was in his opinion going to produce hundreds of  
02:35:31 25 millions?

02:35:31 1 MR. TSUEI: I wouldn't say produce, but his  
02:35:35 2 testimony was if the deal actually closed and Headwater got  
02:35:37 3 some equity in InterDigital, then based on some, you know,  
02:35:42 4 distant forward-looking projection of value based on, among  
02:35:46 5 other things, seems like attorney analysis of projected  
02:35:50 6 judgments, then, yes, the total value at the end of the  
02:35:52 7 day, at some point in the future, might be hundreds of  
02:35:55 8 millions of dollars, that's right.

02:35:56 9 THE COURT: And why is that not within the scope  
02:35:58 10 of Interrogatory No. 30?

02:36:01 11 MR. TSUEI: Because the interrogatory, Your Honor,  
02:36:03 12 says -- the total value or benefit Headwater anticipated  
02:36:09 13 receiving pursuant to the letter of intent.

02:36:13 14 Now, maybe we're just overly narrow in our reading  
02:36:16 15 of the interrogatory, but that was our natural read of the  
02:36:21 16 interrogatory.

02:36:22 17 THE COURT: All right.

02:36:22 18 MR. GRAUBART: Your Honor, if I may, I think I can  
02:36:24 19 resolve this.

02:36:24 20 THE COURT: All right.

02:36:25 21 MR. GRAUBART: Noah Graubart for Samsung.

02:36:25 22 I think we'll take Your Honor's words to heart of  
02:36:28 23 taking the gift of impeachment, and discovery is closed.  
02:36:29 24 If Headwater doesn't believe that this interrogatory is --  
02:36:33 25 needs any more information, we're good with it. They'll

02:36:36 1 stick with this at trial, and Mr. Raleigh can try to  
02:36:39 2 explain how this comports with his belief that it was  
02:36:43 3 actually worth hundreds of millions.

02:36:45 4 THE COURT: Well, I'll take that as Samsung  
02:36:49 5 withdrawing the motion as to Interrogatory No. 30.

02:36:52 6 MR. GRAUBART: Yes, Your Honor.

02:36:54 7 THE COURT: All right.

02:37:17 8 MR. KODISH: Three left, two of which I believe  
02:37:21 9 are very similar, Rogs 31 and 32 pertaining, in general, to  
02:37:28 10 the benefits, improvements, advantages, or other unique  
02:37:32 11 attributes allegedly provided by the asserted patents over  
02:37:35 12 the prior art, including Android prior art.

02:37:41 13 They cite to some other rogs which don't ask the  
02:37:44 14 same question. And then they seem to know that the answer  
02:37:46 15 to this question is within one, two, three, four, five,  
02:37:51 16 six -- eight or nine deposition transcripts, as well as  
02:37:56 17 infringement expert reports and an invalidity expert report  
02:38:00 18 that was recently served. We would like a narrative  
02:38:04 19 response or something that comports with 33(d).

02:38:06 20 THE COURT: Why doesn't the expert report of  
02:38:12 21 Dr. Wesel cover this?

02:38:14 22 MR. KODISH: No doubt there's overlapping  
02:38:16 23 perspective of what Dr. Wesel's opinion is, but as to  
02:38:21 24 whether -- what Headwater's specific perspective is on this  
02:38:26 25 rog, I can't say that they'd read the verbatim information

02:38:33 1 and response.

02:38:40 2 THE COURT: This appears to me to be more of a  
02:38:42 3 contention interrogatory than seeking a matter of fact.  
02:38:49 4 And I think it is not unfair to refer to the expert's  
02:38:52 5 report.

02:38:53 6 I'll deny the motion with respect to Interrogatory  
02:38:57 7 30 -- oh, 31, I'm sorry.

02:39:02 8 MR. KODISH: All right. I suspect that you  
02:39:05 9 probably will reach the same conclusion, then, with 32 and  
02:39:09 10 will not belabor it.

02:39:12 11 THE COURT: All right.

02:39:13 12 MR. KODISH: Unless you want to disabuse me of  
02:39:16 13 that notion.

02:39:17 14 THE COURT: I would hate to do that.

02:39:23 15 MR. KODISH: All right. Let's see, 38 -- oh, my  
02:39:26 16 gosh, I've miscounted. Yes, we have two left, 38 and 39.

02:39:31 17 So 38 asks for the individuals with access to  
02:39:34 18 Headwater's bank accounts in 2012 through 2016 time frame  
02:39:39 19 and other circumstances surrounding an internal financial  
02:39:43 20 audit that revealed to Headwater that Dave Johnson, their  
02:39:48 21 then CFO, was embezzling money from Headwater; the decision  
02:39:53 22 to terminate him from Headwater after that was discovered;  
02:39:57 23 and the decision to keep him on as CFO of ItsOn after the  
02:40:01 24 embezzlement was discovered.

02:40:03 25 And the --



02:40:06 1 THE COURT: Do you also want to know if he was  
02:40:09 2 faithful to his wife?

02:40:10 3 MR. KODISH: Well, so -- so I take from that the  
02:40:12 4 suggestion is what does this have to do with the price of  
02:40:15 5 tea in China?

02:40:16 6 THE COURT: That's a very good read of the room.

02:40:24 7 MR. KODISH: Yeah.

02:40:25 8 So it's an important fact in this case. It's one  
02:40:25 9 we stumbled onto not because Headwater brought it to our  
02:40:30 10 attention, but because another witness, the former acting  
02:40:34 11 CEO, James Harris, did.

02:40:39 12 And in the end, it turns out to be very relevant  
02:40:41 13 to Headwater's financial position leading up to and  
02:40:44 14 including the hypothetical negotiation date. The  
02:40:47 15 embezzlement led to a settlement agreement with  
02:40:52 16 David Johnson which included terms that are informative of  
02:40:57 17 a valuation of a company at the time via the stake that  
02:41:02 18 they described to him as having once upon a time and that  
02:41:08 19 which was being provoked as a result of his embezzlement.

02:41:12 20 So, you know, we think it's relevant. It's also  
02:41:14 21 relevant as to the -- you know, the financial strength of  
02:41:16 22 this couplet of companies at the time of the hypothetical  
02:41:21 23 negotiation. They were having some real problems.

02:41:23 24 THE COURT: And what does who else had access to  
02:41:27 25 Headwater's bank accounts have to do with that?

02:41:30 1 MR. KODISH: Well, it has to do with -- there was  
02:41:40 2 contradictory testimony in this case. There was some --  
02:41:42 3 Dave Johnson said that Greg Raleigh didn't have access.  
02:41:47 4 There was other testimony that James Harris said  
02:41:50 5 Greg Raleigh did have access. There was an issue of  
02:41:52 6 whether Headwater was fully aware of this embezzlement  
02:41:57 7 ongoing during the time of it, and kind of evidencing the  
02:42:01 8 overall financial dire straits that this company was in,  
02:42:05 9 the very weak bargaining position that it would have been  
02:42:08 10 in at the hypothetical negotiation, and that it wasn't  
02:42:11 11 just an ItsOn issue, that it was also potentially a  
02:42:14 12 Headwater issue because the CEO, who for some reason as a  
02:42:18 13 consequence of this determination, gave the CFO a brand new  
02:42:24 14 job at the sister company as his reward for being caught  
02:42:29 15 red-handed.

02:42:30 16 And so we would like to know the extent to which  
02:42:32 17 Headwater was aware of this and knew the kind of financial,  
02:42:37 18 you know, tough spot that the collective companies were in  
02:42:39 19 at the hypothetical negotiation.

02:42:41 20 THE COURT: All right. I'm going to deny the  
02:42:44 21 motion regarding Interrogatory No. 38.

02:42:46 22 And you can expect that there will be a similar  
02:42:52 23 reaction to motions in limine regarding this issue when we  
02:42:58 24 get to trial. But...

02:43:00 25 MR. KODISH: Thank you, Your Honor.

02:43:01 1 The last interrogatory, No. 39, that is how any of  
02:43:08 2 the asserted claims cover, relate to, or involve MIMO  
02:43:12 3 technology. That's multiple input/multiple output antenna  
02:43:18 4 technology in telecommunications.

02:43:19 5 The reason that we pose this question is that  
02:43:23 6 there's a healthy portion of the complaint that talks about  
02:43:27 7 Greg Raleigh's successes in MIMO. It's plainly previewed  
02:43:33 8 that he intends to make that an important point about the  
02:43:40 9 kind of person that is to be believed. He did really great  
02:43:44 10 things in the technology at issue in this case.

02:43:46 11 THE COURT: Cite me to the part of the complaint  
02:43:47 12 that you're referring to.

02:43:48 13 MR. KODISH: Sure. Let's see if we can bring that  
02:43:54 14 up.

02:43:55 15 If you were searching before for ItsOn and were  
02:43:57 16 using that same maybe Control-F method, it would be M-I-M-O  
02:44:03 17 or multiple input/multiple output.

02:44:06 18 So I've got a paragraph --

02:44:06 19 THE COURT: You so overestimate my search  
02:44:09 20 capabilities.

02:44:09 21 MR. KODISH: Well, you looked pretty on top of it  
02:44:09 22 before in that context.

02:44:10 23 Paragraph 4 in the second amended complaint which  
02:44:17 24 was filed March 13th of 2023, it's Docket 42, so  
02:44:28 25 Paragraph 4, Paragraph 5, Paragraph 6, Paragraph 7 --

02:44:35 1 Paragraphs 4 through 7 explaining, you know, essentially  
02:44:40 2 that he's a hotshot in what we think is an unrelated  
02:44:43 3 technology.

02:44:44 4 So we just want the narrative response of what  
02:44:46 5 does this have to do with the claims that you're asserting  
02:44:48 6 in this case because you're talking all about it featured  
02:44:52 7 upfront in the lawsuit against us.

02:45:13 8 THE COURT: And the standards that you cite at the  
02:45:15 9 end of Interrogatory 39 are also referred to in those same  
02:45:21 10 paragraphs; is that right?

02:45:29 11 MR. KODISH: Let's see, the standards that we  
02:45:31 12 cite, sure. Yes, LTE, WiMAX...

02:45:33 13 THE COURT: All right. I see Paragraph 8 has  
02:45:35 14 those.

02:45:35 15 MR. KODISH: Yeah.

02:45:36 16 THE COURT: All right. Well, then, thank you,  
02:45:39 17 Mr. Kodish.

02:45:40 18 MR. KODISH: Yes.

02:45:42 19 THE COURT: Let me hear from Mr. Tsuei.

02:45:44 20 MR. TSUEI: James Tsuei, Your Honor, for  
02:45:52 21 Headwater.

02:45:52 22 Interrogatory No. 39 just doesn't call for any  
02:45:57 23 information that's relevant to any claim or defense in the  
02:45:59 24 case. The allegations that Samsung has directed the  
02:46:04 25 Court's attention to from the second amended complaint are

02:46:07 1 averments about the background of one of the named  
02:46:10 2 inventors. I think it's probably fair and not a subject  
02:46:14 3 for a limine to prevent a named inventor of a patent to  
02:46:19 4 discuss his prior work history and what else he's worked  
02:46:22 5 on.

02:46:23 6 THE COURT: Okay.

02:46:25 7 MR. TSUEI: Now, if there were some discrete legal  
02:46:27 8 issue that Samsung could point out for the Court and for  
02:46:30 9 us, we would consider an interrogatory explaining in  
02:46:33 10 complete detail how the asserted claims relate to a number  
02:46:36 11 of technologies in a different field that Dr. Raleigh  
02:46:39 12 worked on before starting Headwater.

02:46:41 13 But without that initial showing of relevance,  
02:46:44 14 Your Honor, we don't think compelling an answer to this rog  
02:46:46 15 is appropriate.

02:46:47 16 THE COURT: Was it your position that these  
02:46:52 17 technologies that are described in the interrogatory simply  
02:46:57 18 reflect on Dr. Raleigh's background and don't have a direct  
02:47:04 19 relationship to the asserted patents?

02:47:07 20 MR. TSUEI: Yeah, I think that's right, with the  
02:47:10 21 qualifier that there is no direct relationship between the  
02:47:13 22 asserted patents and the prior work that Dr. Raleigh worked  
02:47:15 23 on.

02:47:16 24 Of course, there is technological overlap. For  
02:47:19 25 instance, like the asserted patents may cover WiFi

02:47:23 1 technology or at least communications transmitted over  
02:47:25 2 wireless -- some wireless protocol. But they're not  
02:47:28 3 related, I think, in any way to the specific standards that  
02:47:31 4 are being mentioned in the interrogatory as an example.

02:47:34 5 THE COURT: All right. Thank you, Mr. Tsuei.

02:47:38 6 Mr. Kodish, it -- I would assume that this  
02:47:45 7 interrogatory was asked just to protect you from surprise?

02:47:49 8 MR. KODISH: That's exactly right. Yeah, we  
02:47:51 9 certainly understand the unremarkable expectation that  
02:47:56 10 Dr. Raleigh would cite some portions of his LinkedIn bio  
02:47:59 11 that he worked at a company, he did a thing.

02:48:02 12 This doesn't ask about that. We're asking for a  
02:48:07 13 commitment to know that we're not going to be surprised by  
02:48:10 14 how -- what he deems to be some pioneering parts of his  
02:48:11 15 past also relate to these asserted patents and these  
02:48:15 16 asserted claims.

02:48:16 17 So it sounds like I've heard that they do know the  
02:48:19 18 answer and that it doesn't relate to it, but, you know,  
02:48:22 19 we're asking for the narrative response to make that clear  
02:48:24 20 so we're not surprised.

02:48:26 21 THE COURT: Given the -- the fact that this is  
02:48:31 22 mentioned somewhat prominently in the complaint, I will  
02:48:37 23 grant the motion that there be a narrative response,  
02:48:41 24 although I would expect it to be something along the lines  
02:48:44 25 of what Mr. Tsuei just announced.

02:48:46 1 MR. KODISH: Thank you, Your Honor.

02:48:48 2 THE COURT: What else?

02:49:00 3 MR. KODISH: That's it.

02:49:04 4 THE COURT: Does the Plaintiff have any further  
02:49:09 5 motions or issues that we need to take up?

02:49:12 6 MR. TSUEI: Not at this time, Your Honor. Thank  
02:49:15 7 you for your time.

02:49:16 8 THE COURT: All right. Then I will get out  
02:49:21 9 something in writing on the issue that we carried with  
02:49:24 10 respect to InterDigital, I believe it was.

02:49:29 11 But other than that, we are done. And it's been a  
02:49:34 12 pleasure.

02:49:35 13 COURT SECURITY OFFICER: All rise.

02:49:37 14 (Hearing concluded 2:49 a.m.)

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CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.

/S/ Shelly Holmes  
SHELLY HOLMES, CSR, TCRR  
CERTIFIED SHORTHAND REPORTER  
State of Texas No.: 7804  
Expiration Date: 10/31/2025

4/26/2024  
Date